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Message from the Chair

This past November, the House of Delegates approved a major report on human trafficking.[1] One may wonder what that has to do with the Municipal Law Section. Isn't human trafficking outside the purview of municipal lawyers, municipal law, and the Section? And isn't human trafficking only a New York City issue anyway?

Wrong. On both counts.

This Chair's Message will first, very briefly, lay out some basic facts about human trafficking and then in bullet form report on a dozen cases in communities around the state, outside New York City. The next Chair's Message will discuss the impact of human trafficking on municipalities and their attorneys and suggest ways that municipal counsel can address this critical issue.

First, a few facts. Human trafficking, as defined by international protocol, is

> [T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.][2]

The National Organization of Women-New York State provides a simpler definition: "Trafficking is the global practice of exploiting vulnerable women, men, and children for use as commodities in conditions of sexual and labor servitude."[3] Moreover, as a destination for trafficked women, the U.S. ranks second in the world, with 15,000 to 20,000 victims of human trafficking at any one time.[4] Human trafficking reflects nothing less than "a form of modern-day slavery where people profit from the control and exploitation of others."[5]

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Second, according to the State Bar Report, "[o]ver the past three years alone, publicized arrests and prosecutions in Utica, New York City, White Plains, Yonkers, Newburgh, Massena, Rexford, Henrietta, Pound Ridge, Syracuse, Stony Brook, Montebello, Amherst, Lancaster and Orchard Park show that the human trafficking occurs in large and small cities, across state lines and between New York and Canada—all over the State of New York."[6]

As reported in the press:[7]

Hamburg and Syracuse. A vendor at the Erie County Fair and New York State Fair recruited men from Mexico to work at the fairs for a contractual wage of $10-$12 per hour. But he in fact paid them only $1-$4 per hour, worked them between 16 and 18 hours a day for two weeks straight, without overtime, and provided them only one meal a day—until one of them ended up in the emergency room with an infection from bed bug and flea bites.

Amherst, Lancaster, and Orchard Park. Girls as young as twelve were forced into prostitution.

West Falls. A retired New York State Supreme Court Justice "transport[ed] an illegal immigrant named Coco across state lines to serve as a prostitute at a Royal Order of Jesters convention in Kentucky."[8]

Elmsford. A Florida man transported three women to an Elmsford hotel, where he set up shop, after coercing them into prostitution and forcing them to remain by regularly beating them and threatening to kill them and their families.

Pound Ridge. A well-known author lured women from overseas to work in his home, where he abused them, including turning a Hungarian woman into a sex slave.

Ramapo. A young woman from India entered into an arranged marriage but was then used as an around-the-clock servant in her husband's household for nearly three years, suffering physical and emotional injuries.

White Plains. A Scarsdale High School guidance counselor was involved in "a vast prostitution empire that included human trafficking, money laundering and drug sales."[9]

Rexford, Menands, and Greene County. A woman from India was forced to work more than 17 hours per day seven days a week, 365 days a year, at a family's mansion and previous homes and sleep on the floor in a walk-in closet, was never taken to see a doctor, and was paid only $29,000 instead of the $200,000 owed to her.

New Windsor, Newburgh, and Poughkeepsie. Thirteen individuals lured women from Mexico with promises of a better life but then forced the women into prostitution, brutalized them, beat them, sexually assaulted them, and held them as virtual prisoners at four brothels.

Rochester. Two sisters—ages 23 and 27—sexually trafficked a 14-year-old girl and a 17-year-old girl for prostitution, driving them to meetings with customers.

Human trafficking strikes at municipalities throughout New York State, large and small, urban and rural.

The next *Municipal Lawyer* will review the impact of human trafficking on municipalities and their attorneys and suggest ways that municipal counsel can help combat this scourge.

Mark Davies

Endnotes

1. N.Y. State Bar Ass'n, Special Committee Report on Human Trafficking, 1-97 (2013), *available at* http://www.nysba.org/workarea/DownloadAsset.aspx?id=46041.
2. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *opened for signature* Dec. 12, 2000, 2237 U.N.T.S. 319, Annex II, art. 3(a) (entered into force Dec. 25, 2003), *available at* http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf.
3. Nat'l Org. for Women-N.Y.S., *Human Trafficking Fact Sheet*, Now-NYS, http://www.nownys.org/antitraf_factsheet.html. "Traffickers use fraud, deception, coercion, threats, and force to transport, harbor, or obtain a person to perform commercial sex or labor acts against their will." *Id.*
4. *Id.*
5. *Human Trafficking Overview*, Polaris Project, http://www.polarisproject.org/human-trafficking/overview (last visited Jan. 27, 2014).
6. *See supra* note 1, at 6.
7. *See* 2010 WLNR 23044398; 2011 WLNR 7580795; 2011 WLNR 2038132; 2011 WLNR 2484177; 2011 WLNR 14137275; 2012 WLNR 4448388; 2012 WLNR 27376089; 2012 WLNR 18171203; 2013 WLNR 7864294; 2013 WLNR 10737800; 2014 WLNR 669492; Heather Yakin, *Human trafficking ring busted in Orange County*, Times Herald-Record, Mar. 30, 2013; *see also supra* note 1, app. C.
8. Phil Fairbanks, *Human trafficking close to home*, The Buffalo News, Jan. 31, 2011, *available at* 2011 WLNR 2038132.
9. *H.S. ex-dean faces sex, drug charges*, The Journal News, Nov. 21, 2012, *available at* 2012 WLNR 27376089.

From the Editors

This is our first issue of 2014. The arrival of a new year often is accompanied by optimism as we look forward to the changes and challenges of the coming year. It also is a time to take stock of the year that has ended and to not lose sight of the accomplishments of the past twelve months (or four quarters). In this issue, which has the usual array of articles, updates and Section news, we include articles that look forward—some with optimism and some with dire warnings—as well as others that look back at the last year.

The first article by James J. Coffey, Dr. Robert Christopherson, and Patrick Bowen proposes something new: the authors make the case for using a set of metrics they have developed to measure what they call "municipal profitability." Their approach analyzes data about municipalities in order to provide a more accurate sense of their financial health and to provide a timely warning to those municipalities that may have to act to avoid financial distress.

The second article discusses something old, immunities and indemnities. In their article, Peter A. Bee and James A. Clemons discuss the legal protections afforded municipal officials for acts committed (or omitted) in the course of their public service, whether it be for a local Zoning Board, Planning Board or any other public entity. The authors hope to provide municipal officials with the basic understanding necessary so that, in the event legal action is ever taken against a municipal official, that official can take advantage of the protections afforded to him or her by the laws of his or her respective public entity.

Sharon N. Berlin writes about something new in her notice about a March 2013 amendment to New York State's unemployment insurance law designed to reform the State's unemployment insurance system so that by 2016 the State's Unemployment Insurance Trust Fund will be able to pay off its $3.5 billion debt to the federal government. As the author warns, these amendments have significant financial consequences—for example, late or inadequate responses to Department of Labor requests for information will result in the employer having to pay for any overpayment to the claimant, and the addition of the dismissal pay provision will likely impact the negotiation of severance and settlement agreements.

In the looking back department, Michael Kenneally provides an account of the Fall Section Meeting. His article is accompanied by photos from the meeting as well.

There is the new and the old, and then there is everything you ever wanted to know about probationary employees. Harvey Randall provides a comprehensive discussion of the many legal issues raised by this category of municipal employee. As his article demonstrates, there are many issues addressed in the case law in addition to questions about the notice to be provided when terminating a probationary employee.

Municipal Lawyer Co-editor Sarah Adams-Schoen's article on the role of local governments in climate change adaptation and mitigation looks forward—with both optimism and a warning. The author is optimistic that local governments possess the tools to mitigate climate change and adapt against its related risks. The author warns, however, that municipalities must continue, and even increase, the hard work they are doing to create resilient communities, warning that failure to do so will be costly in terms of property and lives.

Keith P. Brown and John Anzalone also present a warning about something new in their notice about the State Environmental Quality Review Act (SEQRA) revised Long and Short Environmental Assessment Forms (LEAFs and SEAFs). The revisions to the LEAF and SEAF represent a substantial modification to the forms. As the authors warn, the new forms' apparent simplicity may pose a trap for the unwary. Without extensive research, a sponsor or applicant who does not understand the relevant statutory schemes underlying the questions on the forms risks providing responses that could significantly delay development and increase project costs.

Finally, we end the issue by examining the public health legacy of former New York City Mayor Michael Bloomberg. Professor Lawrence Gostin of Georgetown Law School, a leading health law scholar, has studied and written about Mayor Bloomberg's ambitious approach to public health. He elaborates on his views in a question-and-answer session with *Municipal Lawyer* Co-editor Rodger Citron.

Sarah Adams-Schoen and Rodger D. Citron

Why Municipalities Must Be Profitable

By James J. Coffey, Dr. Robert Christopherson and Patrick Bowen

Introduction

James J. Coffey

Dr. Robert Christopherson

Patrick Bowen

Municipal profit is an oxymoron. Municipal loss unfortunately is not. Typically, the public tends to view municipalities as neutral in terms of profit and loss. Government entities are seen as bodies that provide essential services and collect the necessary taxes to pay for these services. Governments are not supposed to go out of business in the way a private company might if it became insolvent. However, we are inundated with stories about municipal bankruptcies, drastic reductions of critical services and occasional dissolutions.[1]

The role of the municipal lawyer in advising municipal leaders about the importance of municipal profitability is critical. Oftentimes, municipal lawyers have the advantage of having a longer tenure with the municipality than elected representatives of the municipality and, thus, may be more sensitive to financial trends. In addition, elected leaders are frequently required to spend a considerable amount of time putting out fires and shoring up their political base. Municipal lawyers are almost always involved in the borrowing process and, as a result, are often more aware of the fiscal direction the municipality is moving in. The financial manager also plays an important role in advising municipal leaders. However, financial managers tend to report information rather than providing an analysis of it. Passing local laws to override New York State tax levy limits is usually within the purview of the municipal lawyer.[2] Finally, the myriad of problems that stem from municipal bankruptcy, including restructuring labor contracts and payments to creditors, are the types of problems that require legal solutions.

Purpose

The purpose of this article is to propose a solution to the financial insolvency that threatens many of our local governments. The solution proposed by this article applies to all municipal governments, including cities, towns, villages and counties. It does not apply to the federal government, which can print money. Nor does it apply to state governments, which can spend money and require local governments to pay the bill by way of unfunded mandates.

The first step is to define the problem. The problem, simply put, is that in the public sector politics trumps reality. The solution is to develop financial metrics that will guarantee solvency—metrics that the public, elected representatives and public employees can understand and support. Furthermore, it is critical to use the financial vernacular of the private sector when discussing the public sector.

"The role of the municipal lawyer in advising municipal leaders about the importance of municipal profitability is critical."

It is important to note that the Office of the New York State Comptroller has undertaken the very challenging task (fiscal stress monitoring system) of identifying municipalities and school districts that are suffering from various levels of financial stress.[3] Each municipality is rated according to a number of financial variables and is given a score based on these variables.[4] Hopefully this rating will enable municipal governments to take appropriate steps before the fiscal problems become insurmountable.

The solution being proposed in this article is more focused and political than the Comptroller's stress test. The purpose here is to develop metrics that will reward municipal leaders who have the courage to collect sufficient taxes to maintain and improve their community's infrastructure. The metrics will also expose those leaders who cut taxes irresponsibly while allowing the infrastructure of the community they represent to deteriorate. The simplicity of the metrics will enable voters to resist the incessant incantations of politicians who rely exclusively on the rhetoric of reducing taxes.

Failure to reinvest in a municipality's infrastructure is a national problem. As a percentage of the gross national product (GNP), the amount spent on infrastructure has declined from 3 percent in the 1960s to 2.4 percent today.[5] To demonstrate the magnitude of this reduction, in 2013 GDP terms, this decline would amount to over $100 billion—enough to build eighteen Tappen Zee bridges. Currently, state and local government account for 75 percent of this spending.[6]

Metrics

The first metric being proposed is composed of two parts: the first part is the excess revenues the municipality generates in a particular year and the second part is the decrease in value of the municipality's infrastructure (i.e., "depreciation"). A municipality will be "profitable" for the purpose of this metric if the excess cash generated in a particular year exceeds the decrease in value of the infrastructure. A municipality will not be "profitable" if the excess revenues are exceeded by the decline in the value of the infrastructure. This article examines the five counties in New York State that are the least profitable and the five that are the most profitable. The article then examines the relationship between a county's profitability and its debt per person and infrastructure investment.

The second metric is the percentage of the municipal budget that the municipality reinvests in its infrastructure. For purposes of this article, the amount spent on transportation and utilities by counties within New York State will serve as a proxy for infrastructure investment.

Using Private Sector Financial Vocabulary

Why do we use terminology from the private sector? Quite simply, because most people understand it. Literally everyone understands what profit means. When businesses are bought and sold, the purchaser usually wants to review the seller's income tax returns. Investors do not want to invest in a business that is unprofitable or, if they do, they want to purchase the business at a fire sale price. Stock prices rise and fall depending on the corporation's quarterly financial reports, and chief executives are hired and fired based upon their ability to generate profit. Most investors are aware of how their investments are doing, but do they know if the municipality in which they reside is profitable?

Defining "Municipal Profit"

Businesses that have a positive cash flow do not always pay taxes. If their excess cash flow is insufficient to offset their depreciation of plant and equipment, then the business will report a loss for tax purposes—despite having excess cash on hand. Taxing authorities understand that an excess of cash alone is not indicative of solvency or profit. What taxing authorities do acknowledge is that for businesses to survive, they are required to maintain their infrastructure in addition to paying their bills. Thus, to be subject to taxation, a business's revenues must exceed current expenses by an amount sufficient to maintain its infrastructure. A business that fails to reinvest in its infrastructure will eventually go out of business.

In fact, the law prohibits businesses from paying dividends to their shareholders unless they have a certain amount of income.[7] Under section 510 (a) of New York State's Business Corporation Law:

> A corporation may declare and pay dividends or make other distributions in cash or its bonds or its property, including the shares or bonds of other corporations, on its outstanding shares, except when currently the corporation is insolvent or would thereby be made insolvent, or when the declaration, payment or distribution would be contrary to any restrictions contained in the certificate of incorporation.[8]

This section of the law prevents a private corporation from distributing dividends when the corporation is insolvent or when such distribution would cause the corporation to become insolvent. Municipalities, however, are not similarly bound. A municipality's taxes can be reduced despite the fact that such reduction could impair the infrastructure of the municipality.

For the purposes of this article, profitable counties are those counties that consistently have an excess of revenues over expenditures. The fact that a county has an excess of revenues over expenditures does not always indicate solvency in that the infrastructure's decline in value may offset the amount of excess revenues. However, as the tables set forth below indicate, there is a very strong correlation between the counties that consistently have an excess of revenues over expenditures and low per capita debt and high infrastructure investment.

The rules are the same for municipalities as for private sector businesses. Failure to generate sufficient revenue to both meet current obligations and maintain the infrastructure translates into insolvency for the municipality. When the municipality is unable to collect sufficient excess revenue to offset the depreciation of the municipality's infrastructure, the municipality should be identified as unprofitable. Unfortunately, in the private sector, the insolvency is transparent; in the public sector it is opaque at best. The reason for the

opaqueness in the public sector is that it lacks the metrics that exist in the private sector that allow for assessment. For example, in the private sector, publicly traded companies must issue quarterly reports to their shareholders indicating profit or loss. Nothing like this exists in the public sector. In essence, public sector information is readily available but it is formatted in a way that makes it very challenging for the average person to evaluate it.

"Homes in communities with high property taxes and poor schools and services are difficult to sell in the same way a business that is losing money is difficult to sell."

The Importance of Municipal Profitability and Infrastructure Investment

Is it important for a municipality to be profitable and to invest in its infrastructure? To paraphrase Coach Lombardi's views regarding winning, "It is not an important thing—it is the only thing."

Perhaps one of the reasons for the lack of concern about municipal profitability is that a taxpayer can "vote with his feet" by moving from a poorly managed municipality to a well-run municipality.[9] Certainly, people often retire to communities that have lower taxes and warmer weather, but even this solution is not as simple as it seems.

First, taxpayers may not want to move away from their friends, family and place of employment. Second, if the municipality that a taxpayer resides in is unprofitable for a period of time, then reductions in services, lower quality schools, and an increase in property taxes are common results. Homes in communities with high property taxes and poor schools and services are difficult to sell in the same way a business that is losing money is difficult to sell. For a great number of people, their home is their largest and most important asset and the asset they should least want to place at risk. Failed communities are not an uncommon sight: empty stores, once grand homes in disrepair or butchered into unsightly apartments, abandoned churches, abandoned businesses and deteriorating houses often presage the financial destruction of a community.

Too often, taxpayers find out too late that their community is not profitable. One definition of bankruptcy is" when you can't pay the interest on the interest." The reality is that a community's elected representatives are hesitant to let the world know that the municipality they govern cannot pay its bills. Elected officials clearly wish to get re-elected and advertising their fiscal failures is not the best way to go about it. In fairness to elected officials, they often inherit unprofitable situations from their predecessors. Elected officials are also subjected to great pressures to keep property taxes low, and this is often done by neglecting the invisible infrastructure, i.e. water and sewer systems. The main reason is that, although municipalities are required by law to make all financial information available, there are no metrics such as profit and infrastructure investment that would enable a voter to quickly and clearly determine the financial status of the municipality. Bond ratings provide some information as to a municipality's financial status, but not with the clarity that a profit metric and infrastructure reinvestment metric do.

The Impact of Profitability Metrics on Municipal Politics

Elected representatives are consistently telling their constituents how many times they have voted to reduce taxes. And who can blame them? Without a metric to expose the meaningless rhetoric about the number of times they voted to reduce taxes, it is the only way they can compete with other politicians. In the private sector, a CEO running a profitable enterprise is not compelled to justify his strategy, as the numbers speak for themselves. It is only the CEOs who are running their businesses at a loss that feel the pressure to explain what they did.

If voters had a metric they had faith in, two things would happen. First, for voters, concern would shift from a blind effort to reduce taxes regardless of the cost to the infrastructure to the profitability of the municipality. Second, voters would reward the elected officials who run a profitable operation with a program to maintain the infrastructure as opposed to those irresponsible leaders who brag how they promote tax reductions while neglecting the infrastructure.

The Benefits of Identifying a Municipality as Unprofitable

Everyone benefits from identifying a municipality as unprofitable. Who would invest in a business if its profitability could not be determined? The purpose of classifying a municipality as unprofitable is not to punish the elected officials, but to provide the residents of the municipality with a warning that changes must be made. To allow the unprofitable condition to continue unabated benefits no one and places at risk the investment an individual has in the community.

So why doesn't municipal solvency have a greater constituency? To make an insolvent municipality

solvent or to maintain solvency usually requires at least one of two things—sometimes both: an increase in taxes and/or a reduction in services. This is not the type of political platform most politicians would choose. Unfortunately political clout resides in two groups: those who demand a reduction in taxes and those who oppose any reductions in services or public employee benefits. A politician with strong survival instincts must navigate between these two groups and the only waters to navigate in are insolvent waters. Politics is not nuanced; it is a bumper sticker game. Being a financial whistleblower and an elected official has major political downsides, the most salient being losing the next election. People are used to voting for politicians who promise to lower taxes and provide more benefits.

Thus, many politicians find it in their best political interest to neglect rather than address infrastructure issues. There is considerable political pressure not to raise taxes. First, much of a municipality's infrastructure is hidden. Former U.S. Senator Alfonse D'Amato was infamously known as "Senator pothole."[10] The essence of the comment is that he was so close to his constituents that they could complain to him about a pothole in the road. Voters do complain about potholes but not about sewer lines until they break. For elected representatives to raise taxes in order to upgrade a part of the infrastructure that is unseen and working requires considerable political courage. Second, both those who want lower taxes and those who want more services are often loath to discussing infrastructure improvements. To invest in infrastructure requires tax revenues in excess of expenditures, which may translate into higher taxes—not exactly the result groups advocating for lowering taxes want. Groups that want more services may see the increased allocation of revenues to infrastructure as a threat to a public employee's job security, benefits and wages. Every group understands that squeezing the budget balloon has consequences. The result is that unseen infrastructure that is under maintained has few champions.

To be complete in this discussion, we must note that there are differences between a private business and a municipality with respect to the threat posed by insolvency. The key differences are lead-time and transparency. Municipalities, at least in the past, had a better opportunity to kick the can down the road than a private company. The ability to tax makes lenders feel more secure in providing long-term financing to municipalities. Private sector companies have a shorter financial leash. As previously mentioned, although a local government's financial information is very accessible, there is no tradition of using a profitability metric for government entities as there is in the private sector. As a result, most voters do not have a good sense of the financial health of their municipality. On the other hand, company presidents who preside over losses year after year do not retain their jobs.

The Consequences of Municipal Unprofitability

What are the consequences when a municipality fails to make a profit? Set forth below are tables of the five most profitable counties and the five least profitable counties, their debt per resident, as well as their infrastructure contribution. Unfortunately, the results are what one would expect. When a municipality does not make a profit, it is forced to borrow to pay its bills. This leads to increased interest payments and less money to fund infrastructure maintenance and other unexpected financial challenges.

Table 1.
Most Profitable/Least Profitable Counties in New York State, 2008-2012

Most Profitable Counties	% of Revenue Over Expenditures	Average Per Capita Debt 2010-11
Herkimer	3.47%	$127.17
Clinton*	3.32%	$391.85
Seneca	3.16%	$455.31
Orleans	2.68%	$347.17
Delaware	2.45%	$441.96
Least Profitable Counties		
Nassau	-13.28%	$3,026.76
Rockland	-12.13%	$1,762.15
Suffolk	-11.16%	$1,379.18
Westchester	-7.87%	$1,286.84
Saratoga	-6.08%	$339.29

Sources: Open Book New York—Office of the State Comptroller: http://wwe1.osc.state.ny.us/transparency/LocalGovResultsTrend.cfm

*Clinton County's revenue number was deflated by $49,819,252 due to a gift (Air Base property transfer) received from the Federal government in 2012. Otherwise revenue would have exceeded expenditures by 35% in 2012.

Size does seem to play a factor in the ability of a municipality to generate a profit. The most profitable counties tend to be upstate and have smaller population densities, while the least profitable counties are mostly downstate and have larger populations. Economists typically argue that larger operations are more efficient, at least up to some level, and can achieve lower cost, i.e., "economics of scale." This does not appear to be the case here or these large counties are past the optimal efficiency point and are experiencing "diseconomies of scale." Further, on average, per capita debt levels are more than four times higher in the least profitable counties, which saddles county taxpayers with more long-term debt to repay.

Table 2.
Percent of Total County Expenditures on Transportation & Utilities, 2009-2011

Most Profitable Counties	2012	2011	2010	2009	2008	5 year avg.
Herkimer	14.4	15.3	15.6	15.1	16.8	15.4%
Clinton	9.3	8.4	10.1	10.5	10.7	9.9%
Seneca	9.6	9.2	12.1	9.1	10.8	10.2%
Orleans	6.4	6.8	9.0	6.3	7.1	7.1%
Delaware	18.1	14.9	19.6	19.5	20.9	18.6%
Least Profitable Counties						
Nassau	4.5	5.0	4.7	4.7	3.9	4.6%
Rockland	7.6	7.0	7.6	7.4	7.0	7.3%
Suffolk	5.7	5.7	7.6	5.8	5.8	6.1%
Westchester	9.1	8.3	7.9	10.9	9.4	9.1%
Saratoga	5.7	5.1	5.5	6.4	5.9	5.7%

Sources: Open Book New York—Office of the State Comptroller: http://wwe1.osc.state.ny.us/transparency/LocalGovResultsTrend.cfm

As seen in Table 2, the most profitable counties spend considerably more of their county's total expenditures on transportation and utilities. On average, the most profitable group spends nearly double (12.2 percent as compared to 6.6 percent) what the least profitable counties spend on infrastructure.=

Bond Ratings

It may interest the reader to know that the Moody's Bond ratings for the least profitable counties have been downgraded or have a negative outlook in all cases. In fact, Rockland County has the lowest rated municipal bonds in the state of New York.[11] If Rockland's bonds fall any further they will be considered non-investment grade, or as some prefer, "junk-bonds." Paradoxically, Westchester County has the highest rated bonds in New York State, but Moody's has issued a negative outlook for Westchester's general obligation bonds due to continuing "operating deficit issues."[12] On the other hand, the most profitable counties all have stable bond ratings and recently both Delaware and Herkimer counties have seen their bond ratings upgraded by Moody's Investor Services.[13]

Few things document a municipality's failure as clearly as the move by a beloved professional sports team to a new venue. Nassau County, for years a refuge for those wishing to escape urban problems, is losing the New York Islanders to Brooklyn. The most debt-laden county in New York State is reaping its ironic reward.[14]

Unfortunately for the least profitable counties, there is a real cost associated with a lower bond rating. Investors will demand higher returns (higher interest payments) on lower rated debt, which increases the cost to these counties when issuing debt to fund their infrastructure projects.

Conclusion

As the tables show, there is no alternative to municipal profitability if a municipality is to survive financially. Some will argue that poorly run municipalities will fail while those that are profitable will prosper. People are free to vote with their feet and move to the well-run community—the equivalent of Adam Smith's invisible hand, but for the public sector. It seems simple but as H. L. Mencken said, "For every complex problem there is an answer that is clear, simple, and wrong."[15]

Failed communities must be bailed out by the federal or state government, which burdens everyone. Detroit's problems are Michigan's problems, and Michigan's problems are the federal government's problem. When communities fail, people do move out—but they take their problems with them.

"[O]nce a municipality files for bankruptcy the need for legal guidance is mandatory. Providing municipalities with advice on how to avoid financial problems is perhaps the most important service a municipal attorney can provide."

We have all heard about kicking the can down the road and its consequences. Unfortunately, our political system is uniquely structured to do just that. The municipal lawyer can play a crucial role in preventing this. In California alone, 500,000 people live in municipalities that are now bankrupt.[16] Detroit's bankruptcy is being appealed by Detroit's unions and retirees.[17] New York State is clearly in better financial shape; however, the Office of the State Comptroller had identified thirty-eight municipalities as of December 31, 2012 that are "facing some level of fiscal stress."[18] Chapter 9 Bankruptcies are ripe with legal issues and complexities. Clearly, once a municipality files for bankruptcy the need for legal guidance is mandatory. Providing municipalities with advice on how to avoid financial problems is perhaps the most important service a municipal attorney can provide.

Endnotes

1. *See* Cory Eucalitto, Kristen De Pena & Shannan Younger, *Municipal Bankruptcy: An Overview for Local Officials*, State Budget Solutions (Feb. 26, 2013), http://www.statebudgetsolutions.org/publications/detail/municipal-bankruptcy-an-overview-for-local-officials (describing municipal bankruptcy filings from San Bernardino, California, Central Falls, Rhode Island, and Jefferson County, Alabama).
2. N.Y. Gen. Mun. Law § 3-c (McKinney 2011).
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4. *See* Fiscal Stress Monitoring System: Municipalities in Stress, Fiscal Years Ending 2012, New York State Comptroller (2012), https://www.osc.state.ny.us/localgov/fiscalmonitoring/pdf/InterpretingLists.pdf (explaining how each municipality is rated).
5. Robert Krueger, *State and Local Governments Lead the Way in U.S. Infrastructure Delivery*, Urban Land Institute (May 16, 2013), http://www.uli.org/press-release/infrastructure2013/.
6. *Id.*
7. *See* N.Y. Bus. Corp. Law § 510 (b) (McKinney 2008)

   > If the capital of the corporation shall have been diminished by depreciation in the value of its property or by losses or otherwise to an amount less than the aggregate amount of the stated capital represented by the issued and outstanding shares of all classes having a preference upon the distribution of assets, the directors of such corporation shall not declare and pay out of such net profits any dividends upon any share until the deficiency…shall have been repaired.

   Id.
8. N.Y. Bus. Corp. Law § 510 (a) (McKinney 2008).
9. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416, 424 (1956).
10. Blaine Harden, *New York's Veteran 'Senator Pothole' Gets Run Over by Schumer*, Wash. Post, Nov. 4, 1998, at A33.
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12. Moody's Investor Service, *Westchester County, NY Credit Rating*, Moodys.com (Oct. 4, 2012), https://www.moodys.com/credit-ratings/Westchester-County-of-NY-credit-rating-600006207.
13. Moody's Investor Service, *Delaware County, NY Credit Rating*, Moodys.com (June 23, 2011), https://www.moodys.com/credit-ratings/Delaware-County-of-NY-credit-rating-600027503; Moody's Investor Service, *Herkimer County, NY Credit Rating*, Moodys.com (Mar. 25, 2013), https://www.moodys.com/credit-ratings/Herkimer-County-of-NY-credit-rating-600025595.
14. Michael Schwirtz, *Long Island Envisions Life After the Islanders*, N.Y.Times, Oct. 30, 2012, at A17, (http://www.nytimes.com/2012/10/30/nyregion/long-island-envisions-life-after-the-islanders.html?_r=0.
15. H.L. Mencken, BrainyQuote.com, http://www.brainyquote.com/quotes/quotes/h/hlmencke129796.html (accessed Jan. 13, 2014).
16. Michael Austin, *The New Normal: Municipal Bankruptcy*, National Review Online (Jul. 11, 2012), https://www.nationalreview.com/nrd/issues/364948.
17. Joseph Lichterman, *Update 2—Judge to rule on Detroit bankruptcy petition on Dec. 3*, Reuters.com (Nov. 25, 2013), http://www.reuters.com/article/2013/11/25/usa-detroit-bankruptcy-idUSL2N0JA1MM20131125.
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James J. Coffey is a practicing attorney in Plattsburgh, New York, and Professor at the School of Business and Economics at the State University of New York in Plattsburgh. He has represented municipalities since the late 1970s and currently represents Clinton County and the Towns of Plattsburgh and Ellenburg.

Dr. Robert Christopherson is a professor and former Chair of the Economics and Finance Department at State University of New York in Plattsburgh. Dr. Christopherson has a Ph.D. in Economics with a concentration in Public Finance. James J. Coffey and Dr. Christopherson have jointly published articles relating to issues concerning the taxation of real property.

Patrick Bowen is a former auditor for the State of New York and currently the Finance Manager for the Town of Plattsburgh.

Indemnities and Immunities for Municipal Officials

By Peter A. Bee and James A. Clemons

Peter A. Bee

A position as a municipal official potentially may expose the official not only to public liability, but also to legal action resulting from the decisions made in his or her capacity as a municipal official. But what are a municipal official's legal rights? May the municipal official be sued? Is the municipal official protected by the municipality that he or she serves? What if a legal judgment is entered against the municipal official? Will the municipal official be personally responsible for the payment of any monetary award? These are crucial questions that beg an equally crucial analysis.

As is typical, the answer is—it depends. It depends on a multitude of factors including—but certainly not limited to—the municipal official's title, the capacity that the municipal official acted under, the respective municipality's local laws and the nature of the complaint filed against the municipal official. Some municipal officials may be entitled to "indemnity" from their municipality, while other municipal officials, by virtue of their position, may be given "immunity." By their very definitions, these two terms entitle the possessor to two very different protections. In fact, certain situations may result in no legal assistance coming at all from the municipal official's own municipality. In understanding one's position as a municipal official, it is imperative that one understand the rights and privileges that a municipal official is entitled to. This article serves as an overview of the immunities and indemnities available to municipal officials.

Indemnification

Indemnification is the act of compensating for loss or damage sustained.[1] In New York, the Public Officers Law provides a scheme for defense and indemnification of officers and employees[2] of various local government bodies, including counties, cities, towns, villages, and school districts, all of which the Public Officers Law refers to as "public entities."[3] However, in order for this scheme to take effect in any given public entity, the governing body of the respective public entity must agree, by adoption of local law, rule or regulation, to confer the benefits of § 18 on its employees.[4] As a result, it is imperative that municipal officials familiarize themselves with the local laws, rules and regulations of their respective public entity in order to understand the exact scope and method of any applicable indemnity. Since most public entities merely enact the language of Public Officers Law § 18, this article focuses on the parameters set forth therein.

James A. Clemons

The "duty to defend or indemnify and save harmless" a municipal official is conditioned upon the following two prerequisite factors: (1) delivery by the municipal official to the chief legal officer of the public entity, or to its chief administrative officer, of a written request to provide for the municipal official's defense, together with the summons, complaint, process, notice, demand or pleading, within ten days after the municipal official is served with such documents; and, (2) "the full cooperation" of the municipal official in the defense of such action or proceeding, and also in the defense of any action or proceeding against the public entity based upon the same act or omission, and in the prosecution of any appeal.[5] "Full cooperation" means that the municipal official is obligated to cooperate in the defense of the action as a condition to receiving defense and indemnification; even the refusal by an official to accept a settlement offer can amount to a "refusal to cooperate," thus preventing any entitlement to prospective defense and indemnification.[6]

Upon compliance with the first of the two prerequisite factors, the public entity is required to take the necessary steps to avoid entry of a default judgment against the municipal official pending the resolution of any questions the entity may have regarding its obligation to provide for a defense.[7] Upon compliance with both of the two prerequisite factors, the public entity shall provide for the defense of the municipal official in any civil action or proceeding, state or federal, arising out of any alleged act or omission which occurred or allegedly occurred while the municipal official was acting within the scope of his or her official duties.[8] However, this duty to provide indemnification shall not arise where a civil action or proceeding is brought by, or at the behest of, the public entity that is employing such municipal official.[9]

A municipal official is entitled to be represented by private counsel of his or her choice in any civil action or proceeding whenever a conflict of interest with the official's employer is determined to exist.[10] Such a determination must be made by either the chief legal officer of the public entity, the counsel that has been des-

ignated by the public entity or the presiding court.[11] It should be of note that the chief legal officer of the public entity, or the counsel that has been designated by the public entity, may require as a condition to such representation of the municipal official that appropriate groups of other employees or municipal officials also be represented by the same counsel.[12] The public entity will pay reasonable attorneys' fees and litigation expenses to such private counsel during the pendency of the civil action or proceeding upon the approval of the public entity's governing body.[13] If there is any dispute as to the representation of multiple employees or municipal officials, or to the amount of litigation expenses and the reasonableness of attorneys' fees, such disputes must be resolved by the presiding court.[14]

Upon entry of a final judgment against the municipal official, or upon the settlement of the claim, the official is required to serve a copy of such judgment or settlement, within thirty days, to the chief administrative officer of the public entity.[15] The public entity is required to indemnify and save harmless its municipal officials in the amount of any judgment or settlement obtained against such official in state or federal court.[16] However, in the event of a settlement, the public entity's duty to indemnify and save harmless its municipal officials is conditioned upon the approval of the settlement by the public entity's governing body.[17]

To qualify for indemnification, however, the act or omission from which such judgment arose must have occurred while the municipal official was acting within the scope of his or her official duties.[18] For example, where a deputy sheriff had "willfully, maliciously, and intentionally" shot a plaintiff, it was held that the public entity was not required to indemnify the deputy because the complained-of acts fell outside the scope of his employment.[19] Moreover, where an off-duty police officer became involved in a physical altercation during a traffic dispute, the altercation at issue was held to be personal in nature and not within the scope of the officer's employment, thus precluding an award of legal fees to the officer.[20]

It should be noted that § 18 of the Public Officers Law does require a public entity to indemnify and save harmless a municipal official when the injury or damage arose from the official's acts of intentional wrongdoing or recklessness.[21] Likewise, Public Officers Law also does not authorize a public entity to indemnify or save harmless a municipal official for any punitive or exemplary damages imposed or for any fines or penalties assessed.[22] A public entity also is not authorized to indemnify or save harmless a municipal official for money that a court recovers from the official pursuant to the Prosecution of Officers for Illegal Acts statute.[23]

Because § 18 authorizes indemnification for civil matters only, it should come as no surprise that the indemnification schemes enacted by most New York State public entities do not provide indemnification for criminal actions. This was highlighted in an Appellate Division, Second Department case, where the court found that the public official plaintiff was not entitled to reimbursement for the legal expenses "incurred in successfully defending a Federal criminal prosecution in connection with his duties as a Town Councilman, since in the absence of any statute authorizing it, there is no obligation on the part of a public employer to reimburse an employee for expenses incurred in a criminal case."[24] The court explained that, while the Town had previously adopted a local law that required public employers to defend and indemnify its employees "in any 'civil action or proceeding' arising out of the performance of such employee's 'public employment or duties', the Town has never adopted any other similar local law or resolution to provide for the defense or indemnification of public employees who are the subjects of criminal prosecutions."[25]

As such, the opinions from New York State courts have made it very clear that while the Public Officers Law provides for certain criminal indemnity for State officials, criminal indemnity is not applicable to a public entity unless the local governing body specifically adopts such a provision.[26] In other words, even when a local governing body adopts the provisions of § 18 of the Public Officers Law in its entirety, no indemnification for criminal matters is available.[27] Therefore, a public official can logically conclude that without a specific legislative provision granting such criminal indemnity, he or she has no indemnity for criminal legal matters. It should be noted, however, that should a public entity desire to specifically provide criminal indemnity to a public official, the entity would be required to prospectively adopt such a local indemnification law.[28] Based on the foregoing, it is imperative that every municipal official understand the local laws, rules or regulations of his or her respective public entity.

Immunity

Immunity is any exemption from a duty, liability or service of process.[29] This is a very different protection than indemnity; immunity is a blanket protection from suit. That is to say, while officials are generally indemnified against suit, immune officials simply cannot be sued for work in their official capacity:

> An immunity is a defense to tort liability which is conferred upon an entire group or class of persons or entities under circumstances where considerations of public policy are thought to require special protection for the person, activity or entity in question at the expense of those injured by its tortious act. Historically, tort litigation against

> units of government, public officers, and charities, and between spouses, parents and children, has been limited or prohibited on this basis.[30]

There are two different types of immunity that apply to municipal officials—"absolute" immunity and "qualified" immunity. However, it should be noted that immunity does not apply to equitable causes of action against municipal officials, and that an official who is given immunity is not barred from the granting of injunctive relief or any other equitable relief against him.[31]

Absolute immunity is a complete exemption from civil liability, usually afforded to officials while performing particularly important functions, such as a representative enacting legislation and a judge presiding over a lawsuit.[32] It refers to the right to be free not only from the consequences of the litigation's results, but also from the burden of defending oneself altogether. Absolute immunity is generally reserved for judges performing judicial acts within their jurisdiction,[33] prosecutors performing acts intimately associated with the judicial phase of the criminal process,[34] and quasi-judicial agency officials whose duties are comparable to those of judges or prosecutors when adequate procedural safeguards exist.[35]

For example, Zoning Board of Appeals members have absolute immunity from suit under state law because Zoning Boards are regarded as quasi-judicial bodies, entitling its members to judicial-type immunity from suit in their official capacities.[36] Furthermore, attorneys serving at the pleasure of a Zoning Board may also have immunity.[37] This is so because, as quasi-judicial bodies, Zoning Boards are entitled to the same immunity from suit that the judiciary is entitled to. Furthermore, because attorneys to Zoning Boards are akin to a Judge's Law Secretary, they are also immune from suit.[38] Attorneys advising a Zoning Board are also free from suit in their capacity because of a lack of contractual privity between the attorney and any third-party that may attempt to bring suit.[39]

Qualified immunity is immunity from civil liability for a public official who is performing a discretionary function, so long as the official's conduct does not violate clearly established constitutional or statutory rights.[40] Qualified immunity is a common-law protection, and is an immunity that is granted to public employees from lawsuits brought against them in their individual capacities.[41] Qualified immunity is designed to allow municipal officials to avoid the expense and disruption of going to trial, and is not merely just a defense to liability. It is "qualified" in that it does not immunize municipal officials from actions that were plainly incompetent or a knowing violation of law,[42] or from actions based on malice, bad faith or improper purpose.[43]

To be eligible for qualified immunity, a municipal official must be acting in his or her official capacity as a government official, and not merely as an employee or agent of the government.[44] Furthermore, the municipal official must be performing discretionary functions and not mere ministerial duties.[45] Discretionary functions are those that require "the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done or a course pursued."[46] For discretionary functions, immunity applies as long as the action does not violate a clearly established statute or constitutional right.[47] Ministerial functions are acts performed without the independent exercise of discretion or judgment,[48] such as those of a clerical nature.

The doctrine of qualified immunity extends to federal litigation as well. This is particularly true in cases of 42 U.S.C. § 1983 Civil Rights actions against government officials.[49] The doctrine of official immunity against personal liability in suits brought by public employees against public officials pursuant to § 1983 is a defense based upon the longstanding notions of public policy established by the courts to protect public officials in the proper exercise of their duties. To qualify for such immunity, one must have acted in "good faith," which is an objective standard that measures reasonableness without regard to the official's subjective state of mind.[50] It should be of note that while qualified immunity may preclude a municipal official's personal liability for money damages in § 1983 claims, qualified immunity does not apply to any equitable relief sought.[51] The apparent theory is that officials, while immune from money damages, must nevertheless conform their conduct to the Constitution.[52]

Conclusion

Municipal officials are afforded various legal protections for acts committed (or omitted) in the course of their public service, whether it be for a local Zoning Board, Planning Board or any other public entity. These protections range from indemnity to qualified immunity to absolute immunity. As seen from the examples discussed herein, the application of these protections often requires a fact-finding process to determine the regulations of the public entity, the nature of the complaint and the title and capacity of the municipal official.

We hope that with the basic understanding discussed in this article, you will go back to your Town, Village or other public entity and review its local laws, rules or regulations—so that in the event legal action is taken against you personally in connection with your official capacity, you can take advantage of the full protections afforded to you by the laws of your respective public entity.

Endnotes

1. Black's Law Dictionary (9th ed. 2009), *available at* Westlaw BLACKS.
2. "Employee" means "any commissioner, member of a public board or commission, trustee, director, officer, employee, volunteer expressly authorized to participate in a publicly sponsored volunteer program, or any other person holding a position by election, appointment or employment in the service of a public entity, whether or not compensated," but does not include "the sheriff of any county or an independent contractor." The term "employee" does include "a former employee, his estate or judicially appointed personal representative." N.Y. Pub. Off. Law § 18(1)(b).
3. The term "public entity" means "(i) a county, city, town, village or any other political subdivision or civil division of the state, (ii) a school district, board of cooperative educational services, or any other governmental entity or combination or association of governmental entities operating a public school, college, community college or university, (iii) a public improvement or special district, (iv) a public authority, commission, agency or public benefit corporation, or (v) any other separate corporate instrumentality or unit of government;" but does not include "the state of New York or any other public entity the officers and employees of which are covered by section seventeen of this chapter or by defense and indemnification provisions of any other state statute taking effect after January first, nineteen hundred seventy-nine." N.Y. Pub. Off. Law § 18(1)(a); *see also Zimmer v. Town of Brookhaven*, 247 A.D.2d 109, 112, 678 N.Y.S.2d 377, 379-80 (2d Dep't 1998) (describing history of sections 17 (applicable to state officers and employees) and 18 (applicable, upon adoption, to local government officers and employees) of the Public Officers Law).
4. N.Y. Pub. Off. Law § 18(2).
5. N.Y. Pub. Off. Law § 18(5).
6. *Lancaster v. Inc. Vill. of Freeport*, 22 N.Y.3d 30, 2013 N.Y. Slip Op. 07652 (2013) (Village was entitled to withdraw defense and indemnification of municipal employees in civil RICO action based on employees' refusal to accept settlement, where employees were obligated to cooperate in defense, and village acted diligently to bring about their cooperation by responding to concerns and explaining why non-disparagement clause in settlement was proper).
7. N.Y. Pub. Off. Law § 18(3)(d).
8. N.Y. Pub. Off. Law § 18(3)(a).
9. *Id.*
10. N.Y. Pub. Off. Law § 18(3)(b).
11. *Id.*
12. *Id*.
13. *Id*.
14. N.Y. Pub. Off. Law § 18(3)(c).
15. N.Y. Pub. Off. Law § 18(4)(d).
16. N.Y. Pub. Off. Law § 18(4)(a).
17. *Id.*
18. *Id.*
19. *Rew v. Cnty. of Niagara*, 73 A.D.3d 1463, 901 N.Y.S.2d 442 (4th Dep't 2010) (alleged conduct of unnamed deputy sheriff of willfully, maliciously, and intentionally shooting plaintiff fell outside scope of deputy's employment with county, so that county was not required to indemnify deputy in plaintiff's personal injury action).
20. *Sanchez v. New York City Transit Auth.*, 254 A.D.2d 345, 678 N.Y.S.2d 664 (2d Dep't 1998) (altercation in underlying action to recover damages for personal injuries allegedly caused by a city transit police officer was personal in nature and not within the scope of his employment, thus warranting a denial of legal fees to the officer, being that the altercation at issue was caused by a traffic dispute while the officer was off-duty).
21. N.Y. Pub. Off. Law § 18(4)(b); *see, e.g., Grasso v. Schenectady Cnty. Public Library*, 30 A.D.3d 814, 817 N.Y.S.2d 186 (3d Dep't 2006) (conduct of two employees of county-operated public library, as alleged in complaint of former employee asserting claims for sexual harassment, prima facie tort, and intentional infliction of emotional distress, amounted to intentional torts, and so fell outside scope of their employment and any duty by county to indemnify them).
22. N.Y. Pub. Off. Law § 18(4)(c); *see, e.g., Myers v. City of Rochester*, 116 Misc. 2d 83, 455 N.Y.S.2d 188 (N.Y. Sup. Ct. 1982) (ban against punitive damages applied to individual police officers who were acting within scope and duty of their employment when they allegedly assaulted and falsely arrested plaintiff).
23. N.Y. Pub. Off. Law § 18(4)(c); N.Y. Gen. Mun. Law § 51.
24. *Zimmer v. Town of Brookhaven*, 247 A.D.2d 109, 678 N.Y.S.2d 377 (2d Dep't 1998).
25. *Id*.
26. *See, e.g., id.* at 113-14; *see also* N.Y. Pub. Off. Law § 19(2)(a) (criminal indemnity applicable to state employees).
27. *See id.* at 112-14 (holding that, although Town of Brookhaven adopted section 18 in its entirety, no criminal indemnity was available for employee because section 18 is limited to civil indemnity and Town did not supplement section 18 with a criminal indemnity provision).
28. New York State Comptroller Opinion No. 2000-1 (Feb. 28, 2000). Note, however, that the Attorney General has concluded that a public entity's payment of legal fees when an employee is found *guilty* of criminal charges would constitute an unconstitutional gift of public funds because an employee acting criminally is not acting within the scope of his public employment. Op. Atty. Gen. No. 2003-16, 2003 WL 22669327, at *2 (Nov. 4, 2003).
29. Black's Law Dictionary (9th ed. 2009), *available at* Westlaw BLACKS.
30. Edward J. Kionka, Torts in a Nutshell 341 (2d ed. 1992).
31. *See Schloss v. Bouse*, 876 F.2d 287, 292 (2d Cir. 1989) (official's entitlement to absolute immunity from claim for damages does not bar granting of injunctive relief or of other equitable relief); *see also Adler v. Pataki*, 185 F.3d 35, 48 (2d Cir. 1999) ("Qualified immunity shields the defendants only from claims for monetary damages and does not bar actions for declaratory or injunctive relief.").
32. Black's Law Dictionary (9th ed. 2009), *available at* Westlaw BLACKS.
33. *See Hili v. Sciarrotta*, 140 F.3d 210, 213 (2d Cir. 1998) ("Judges performing judicial functions within their jurisdictions are granted absolute immunity.").
34. *See Schanbarger v. Kellogg*, 35 A.D.2d 902, 902, 315 N.Y.S.2d 1013, 1015 (3d Dep't 1970) ("An Assistant District Attorney is a quasi-judicial officer and, as such, he, as well as all persons acting under his direction and control, are immune from civil suit for official acts performed by them in the investigation and prosecution of the crime.").
35. *See Allan & Allan Arts Ltd. v. Rosenblum*, 201 A.D.2d 136, 141, 615 N.Y.S.2d 410, 413 (2d Dep't 1994) ("this court set forth the following guidelines for determining whether an administrative proceeding constitutes a quasi-judicial proceeding in which pertinent statements are afforded an absolute privilege: 'The shield of absolute immunity extends to proceedings of administrative agencies where such proceedings are adversarial, result in a determination based

upon the application of appropriate provisions in the law to the facts and which are susceptible to judicial review'").

36. *Hi Pickets, Inc. v. Music Conservatory of Westchester, Inc.*, 192 F. Supp. 2d 143, 159 (S.D.N.Y. 2002).
37. *See Alfano v. Vill. of Farmingdale*, 693 F. Supp. 2d 231 (E.D.N.Y. 2010) (Zoning Boards of Appeals and their attorneys are subject to immunity).
38. *See id*. at 233-34.
39. *See id*. at 234 ("The plaintiff then sued the zoning board's legal advisor, alleging that the defendant attorney had wrongfully advised the board not to grant its application. Judge McMahon found that the only claim that these facts could support was for professional negligence, and that this claim required privity of contract between the plaintiff and the defendant attorney. Finding that the plaintiff had no privity with the zoning appeals board's counsel, the court dismissed all claims against the defendant lawyer.") (internal citations omitted).
40. Black's Law Dictionary (9th ed. 2009), *available at* Westlaw BLACKS.
41. *See Dawkins v. State*, 1996 WL 156764, *3 (N.D.N.Y. 1996) ("The doctrine of qualified immunity protects public employees in their individual capacities.").
42. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").
43. *See Konikoff v. Prudential Ins. Co.*, 234 F.3d 92, 98, 99 (2d Cir. 2000) (proof of malice defeats qualified immunity); *see also Dawson v. Cnty. of Westchester*, 351 F. Supp. 2d 176, 200 (S.D.N.Y. 2004) ("government officials or employees who make decisions that are discretionary, but not judicial in nature, are entitled to qualified immunity unless 'there is bad faith or the action is taken without a reasonable basis'").
44. *See Tyler v. State of N.Y.*, 953 F. Supp. 63, 67 (W.D.N.Y. 1997) ("The doctrine of qualified immunity shields government employees, acting in their official capacity, 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'").
45. *See Kaminsky v. Rosenblum*, 929 F.2d 922, 925 (2d Cir. 1991) (holding that qualified immunity doctrine applies where government official performs discretionary function, as distinct from ministerial function).
46. *Fahey v. U.S.*, 153 F. Supp. 878, 886 (S.D.N.Y. 1957).
47. *Tyler*, 953 F. Supp. at 67.
48. Black's Law Dictionary (9th ed. 2009), *available at* Westlaw BLACKS.
49. *See Molina v. New York*, 2011 WL 6010907, *13 (N.D.N.Y. 2011) ("Public officials enjoy qualified immunity from liability under § 1983 'so long as their conduct does not violate a clearly established statutory or constitutional right.'").
50. S*ee Harlow v. Fitzgerald*, 457 U.S. 800, 815-20 (1982) (proper standard is objective reasonableness, not subjective good faith).
51. *See Giacalone v. Abrams*, 850 F.2d 79, 84 (2d Cir. 1988) ("When a plaintiff seeks both damages and equitable relief, successful assertion of qualified immunity frees an official only from the burden of defending against personal liability for damages. The official still must participate in the ongoing suit to litigate the remaining equitable claims."); *see also Adler v. Pataki*, 185 F.3d 35, 48 (2d Cir. 1999).
52. *See Tyler v. State of N.Y.*, 953 F. Supp. 63, 67 (W.D.N.Y. 1997).

Peter Bee is a partner in the 18-attorney general practice law firm of Bee Ready Fishbein Hatter & Donovan, LLP, where he directly supervises the firm's municipal, labor and election law units. Mr. Bee's practice includes acting as counsel to numerous municipal clients at the County, Town, Village and Special District levels, and also includes acting as Special Labor Counsel to the County of Nassau from 1980–2002 and 2010 to present. In addition to serving as Counsel to numerous Zoning and Planning Boards, Mr. Bee also currently serves as Counsel to the Suffolk County Village Officials Association. He is a former Village Trustee and Village Mayor in his hometown of Garden City, where he now serves as the Village Attorney. A graduate of St. John's University (undergraduate and law), Mr. Bee founded his law firm in 1980 after ten years of Nassau County Government experience. He is a published author on a variety of municipal law topics, and a frequent speaker at professional associations.

James Clemons is an associate at the law firm of Bee Ready Fishbein Hatter & Donovan, LLP, where he concentrates in municipal, labor and election law, among other areas of the law. A 2012 graduate of Hofstra University's School of Law, Mr. Clemons joined the law firm in 2010 and thereafter became an associate in 2013 upon his admittance to practice law in the State of New York. Mr. Clemons currently assists Peter Bee with many of the law firm's municipal, labor and election law matters.

Overview of New York State's Unemployment Insurance Reform

By Sharon N. Berlin

Amendments to New York State's unemployment insurance law, signed by Governor Andrew Cuomo on March 29, 2013,[1] are designed to reform the State's unemployment insurance system so that by 2016 the State's Unemployment Insurance Trust Fund will be able to pay off its $3.5 billion debt to the federal government. The amendments impose significant fiscal consequences to an employer that fails to timely or adequately respond to New York Department of Labor (DOL) requests for information; limit the receipt of benefits by former employees to only those who are actively seeking work; limit the receipt of benefits by claimants who have received severance benefits; and increase the wage base upon which employer unemployment contributions are paid. The amendments also increase the maximum and minimum weekly benefit amounts for claimants and include additional penalties if a claimant willfully makes a false statement or representation to obtain unemployment benefits.

Employer Responses to DOL Requests for Information

Effective October 1, 2013, the amendments prohibit the Commissioner of Labor from relieving an employer of charges resulting in an overpayment of benefits where the overpayment was made because the employer or its agent failed to timely or adequately respond to a request for information in relation to an unemployment insurance claim.[2] Section 472.12 of the Regulations of the Industrial Commissioner, governing employer responses to requests from the DOL for employee information in connection with a pending unemployment insurance application, were revised effective October 1, 2013.[3] These new restrictions have important implications for employers seeking to contest unemployment insurance applications.

Deadline to Respond

An employer continues to have ten calendar days from the date of the claim notice to respond to a notice of potential charges.[4] However, all other information pertaining to an unemployment insurance claim must now be received by the DOL "within the number of days specified in the request for the information," which can be shorter than the previous deadline of ten calendar days.[5]

Section 472.12(c) now specifies the permissible methods by which the DOL can communicate its request for information, as well as the methods by which an employer may respond to the request. The DOL may communicate its request for information by letter, electronic communication, fax, telephone, through the State Information Data Exchange System (SIDES) (if the employer agrees), or any other DOL-approved method. Employers may respond to these requests by fax, electronic communication, SIDES, U.S. Postal Service, private delivery service, telephone (if the request requires), or any other DOL-approved method. The regulation also now imposes an obligation on employers to notify the DOL of any changes in the employer's contact information. If an employer fails to alert the DOL of those changes, a request for information sent to the last known address, phone number, fax number, or email address will be deemed to have been sent to the correct address.[6]

The DOL's Receipt of a Response

An employer's response to a DOL request will be deemed received on the date indicated by the date stamp on an incoming document. If the DOL did not date stamp the response, the receipt date will be deemed to be two days prior to the date the document was entered into the DOL's imaging system. If an employer disputes the receipt date, the employer has the burden of providing proof that the response was timely. This may include a confirmation of delivery, stamped receipt by an agent of the Commissioner of Labor, or an affidavit of personal service on the Commissioner or his or her agent.[7]

Adequacy of Employer Response

Section 472.12 also sets forth new criteria regarding the contents of an employer's response to information requests. In order for an employer's response to be considered "adequate," the response must: (1) specify the reason for the issue affecting the claimant's eligibility for or entitlement to unemployment insurance benefits; (2) answer all questions in good faith and in detail; and (3) provide all relevant information and documentation that would assist the DOL in making a determination regarding the claimant's eligibility for or entitlement to benefits.[8]

Potential Consequences of an Untimely Response

If the Commissioner of Labor determines that an overpayment of benefits occurred due to the employer's failure to timely or adequately respond to a claim notice or other request for information, the employer's account will nonetheless be charged for the overpayment. These charges will continue through the date on which the DOL makes a determination that the claimant is no longer eligible for or entitled to benefits.[9]

There are, however, exceptions to this rule. If it is the first time that an employer failed to timely respond, the employer will be relieved of charges relating to the overpayment of benefits if it demonstrates good cause for its untimely response. The Commissioner determines whether an employer's excuse constitutes good cause; however, the regulation states that "good cause" includes any event that the employer could not have reasonably anticipated and that affected its ability to timely respond. Any subsequent untimely responses will result in an employer being charged for overpayments unless the lateness was due to DOL error or a disaster emergency.[10]

Wage Base for Unemployment Insurance Contributions

The amendments increase the wage base upon which employer unemployment insurance contributions are assessed. Effective January 1, 2014, contributions will be assessed on the first $10,300 of each employee's earnings (previously the wage base was the first $8,500 of each employee's earnings). Thereafter, the threshold wage base will increase by $200 to $300 on each January 1 through 2026. On January 1, 2027 and each January 1 thereafter, the wage base will be adjusted to 16% of the state's average annual wage.[11]

Contribution Rate Schedules

The reform eliminates the six lowest contribution rates for employers, effective January 1, 2014.[12]

Weekly Benefits

On October 6, 2014, the minimum weekly benefit will increase from $65 to $100 and the maximum from $405 to $420. These amounts will increase in October of each year thereafter.[13]

Severance or Dismissal Payments

Effective January 1, 2014, a claimant who receives dismissal pay (e.g., severance pay) that is greater than the maximum weekly unemployment benefit will not be eligible to collect unemployment insurance benefits during the dismissal period. The term dismissal pay includes payments made by an employer to an employee upon separation from service but does not include payments for pension, retirement, accrued leave, health insurance or supplemental unemployment benefits. If the initial payment of dismissal pay is not made within 30 days after the employee's last day of employment, however, receipt of unemployment insurance benefits is not precluded.[14]

Pension Payments

Effective January 1, 2014, a claimant will not be permitted to collect benefits if the claimant is collecting a pension from an employer that is chargeable on the claim and that employer contributed to the pension.[15]

Eligibility for Benefits Limited to Those Actively Seeking Work

Effective with the Governor's March 29, 2013 signing of the amendments, a claimant who is not actively seeking work is no longer eligible for benefits. The phrase actively seeking work is defined in the amendments as engaged in systematic and sustained efforts to find work. Labor Law § 591(2) now directs the Commissioner of Labor to promulgate regulations defining systematic and sustained efforts to find work and setting standards for the proof of work search efforts. As of the date of this writing, these regulations have not yet been promulgated. Section 591(2) continues to prohibit the receipt of benefits by claimants who are not capable of work or who are not ready, willing and able to work.[16]

Re-qualification for Benefits

Effective January 1, 2014, the remuneration that must be earned before a claimant can become eligible for benefits again is increased to ten times the claimant's weekly benefit rate where the claimant voluntarily separates from employment without good cause, is discharged due to misconduct or, without good cause, refuses to accept an offer of employment for which the claimant is reasonably fitted by training and experience.[17]

New Penalty for Fraud

The amendments also add a civil penalty to be assessed on a claimant equal to the greater of $100 or 15% of the total overpaid benefits where monies are received based on a willfully false statement or representation.[18]

Conclusion

The amendments have significant financial consequences. Late or inadequate responses to DOL requests for information will result in the employer having to pay for any overpayment to the claimant. The addition of the dismissal pay provision will likely impact the negotiation of severance and settlement agreements.

Endnotes

1. 2013 N.Y. Laws ch. 57, § O.
2. N.Y. Lab. Law § 597(2)(d).
3. 12 N.Y.C.R.R. § 427.12.
4. *Id.* § 427.12(a).
5. *Id.* § 427.12(b).
6. *Id.* § 427.12(d).
7. *Id.* § 427.12(e).
8. *Id.* § 427.12(f).
9. *Id.* § 427.12(g).
10. *Id.* § 427.12(h).
11. N.Y. Lab. Law § 518(1)(a).
12. *Id.* § 581.
13. *Id.* § 590(5)(b).
14. *Id.* § 591(6).
15. *Id.* § 600.
16. *Id.* § 591(2).
17. *Id.* § 593(1)(a).
18. *Id.* § 594(4).

Sharon N. Berlin is a partner in the Melville, New York law firm of Lamb & Barnosky where she counsels public and private sector employers. She is Chair of the Municipal Law Section's Employment Relations Committee. Ms. Berlin prepared this article with the assistance of her law clerk, Jacob Chase.

Notes from the Fall Section Meeting

By Michael Kenneally

The Municipal Law Section held its joint Fall Meeting with the Environmental Law Section on October 25–27, 2013 at the Jiminy Peak Mountain Resort in Hancock, Massachusetts. The event offered eleven continuing legal education (CLE) credits and two networking receptions, each followed by a dinner featuring distinguished speakers. There was much to learn and many opportunities to network. Below I provide some notes on the meeting.

The program began on Friday afternoon with welcoming remarks by NYSBA President-elect Glenn Lau-Kee and by Section Chairs Mark Davies (Municipal Law Section) and Kevin Reilly (Environmental Law Section). The Friday program offered four transitional CLE credits. Aside from benefiting attorneys in their first two years of practice, these sessions provided valuable cross-training for experienced municipal and environmental practitioners.

NYSBA President-elect Glenn Lau-Kee welcomes members of the Environmental and Municipal Law Sections to the joint Fall Meeting of the Sections at Jiminy Peak.

Sarah Brancatella (the Association of Towns of the State of New York) and Michael Lesser (Sive, Paget and Reisel) opened the substantive program with a review of the more prominent municipal and environmental cases of the year, addressing issues such as prevailing wage rates, lead paint abatement, and, of course, a little publicized issue known as "hydro-fracking." Sarah and Michael were followed by Dominic Cordisco (Drake Loeb) and Jennifer Van Tuyl (Cuddy & Feder), who shared their knowledge and thoughts on the new environmental assessment forms and recent changes to the SEQRA regulations. Winding up the program on Friday were Gail Suchman (Stroock & Stroock & Lavan) and Carla Weinpahl (Environmental Resources Management), who provided a dynamic review of how to evaluate the environmental exposure associated with complex property transactions.

Sarah Brancatella shares her thoughts on the NYC taxi-cab medallion case.

Municipal Law Section Chair Mark Davies delivers opening remarks at the joint Fall Meeting of the Environmental and Municipal Law Sections.

Saturday morning featured a panel on the challenges that are posed by superstorms and other natural disasters. Sarah Adams-Schoen (Touro Law Center) led off the panel discussion with a presentation on how local governments must adapt to a changing environment and mitigate the long-term risks and hazards of climate change. To hammer home this point, Bill Cherry (County Treasurer, Schoharie County) and Kevin Crawford (New York Municipal Insurance Reciprocal, or NYMIR) gave first-hand accounts of the real-life challenges a local government faces in the aftermath of these disasters.

Recounting his experience from the terrible damage caused by tropical storm Lee and Hurricane Irene in 2011, Bill discussed how to make payroll on two days' notice when all checks and printing equipment have been destroyed, and how to finance government operations without access to local government funds. Kevin shared NYMIR's experience in helping Schoharie County get back on its feet—and how arriving on the scene one day after a natural disaster with insurance proceeds in excess of $1 million will get you through even the most stringent police barricades! The panel was rounded off by H. Neal Connolly and Dwayne LeBlanc of Wright National Flood Insurance, who discussed the ins-and-outs of federal programs designed to assist municipalities in the aftermath of these disasters.

Dominic Cordisco and Jennifer Van Tuyl discuss the new EAF forms at the joint meeting of the Environmental and Municipal Law Sections.

The panel on superstorms was followed by a lively analysis of ethics issues related to gifts to municipal officials. Steven Leventhal (Leventhal, Cursio, Mullaney & Sliney) and Carol Van Scoyoc (White Plains Corporation Counsel's Office) walked the audience through the maze of statutes (the General Municipal Law, the Lobbying Law and the Penal Law) that public officers risk running afoul of when presented with a gift from a member of the public, a vendor, or other third party.

Carol Van Scoyoc fields a question on municipal ethics.

On Sunday morning, environmental attorneys learned more about the New York State Department of Environmental Conservation's new audit incentive policy and changes to the EPA self-audit policy during a presentation delivered by Carl Howard (U.S. Environmental Protection Agency, Region 2) and Monica L. Kreshik, (New York State Department of Environmental Conservation). For the municipal attorneys, the final program of the weekend was one certainly worth staying for, as Kenneth Bond (Squire Sanders) and Theodore Orson (Orson and Brusini) examined the fiscal crisis the City of Detroit is currently facing and what the implications of Detroit's bankruptcy proceedings may be for local governments in New York.

Sarah Adams-Schoen, Bill Cherry and Kevin Crawford discuss the challenges to government recovery in the aftermath of superstorms.

Members of the Municipal and Environmental Law Sections attend a networking reception during the joint meeting of the Sections held at Jiminy Peak.

Even with a full program of eleven CLE credits, there were still plenty of opportunities for networking and events. The Jiminy Peak Mountain Resort area offered plenty of afternoon activities. And the receptions and dinners not only provided an excellent opportunity to network, but also offered engaging speakers in Gene Kelly (New York State Department of Environmental Conservation Region 4) and Jack McEneny (former New York State Assemblyman and Albany historian) to round off the night.

Ken Bond and Theodore Orson relay their insight on what the Detroit bankruptcy proceedings mean for New York's local governments.

The Municipal Law Section would like to thank all of its members who took time out of their schedules to attend this meeting. Your participation at these meetings, and in our Section, strengthens the Section as whole. We welcome your continued participation, and for those seeking more ways to become actively involved in the Municipal Law Section, please do not hesitate to contact us!

Michael E. Kenneally, Jr. is Associate Counsel at the Association of Towns of the State of New York. He is a member of the Executive Committee of the Municipal Law Section of the NYSBA and a member of the Board of Trustees of the New York Municipal Workers Compensation Alliance. He received his JD from Albany Law School of Union University.

MLS members Joel Sachs and Gerard Fishberg are joined by NYSBA President–Elect Glenn Lau-Kee at the networking reception.

All About Probationary Employees in the Classified Service

By Harvey Randall

If you are involved in a matter regarding the termination of a probationary employee, you almost certainly will encounter one or more of the following questions: What notice actually was provided—and what notice should have been provided—to the terminated employee? What is the relationship between the public laws and regulations governing probationary employees and the applicable collective bargaining agreement? How do alternative work assignments figure into the termination of probationary employees? What considerations factor into determining the notice of termination date? What are traineeship requirements, and how do they factor into the termination decision? Under what circumstances is a terminated probationary employee entitled to a "name-clearning hearing"?

This article addresses all of these questions and provides guidance on the relevant laws, rules, and case law. It begins by noting two essential State laws: New York State's Civil Service Law Sections 63(1) and 75. Section 63(1) provides, in pertinent part:

> Every original appointment to a position in the competitive class and every interdepartmental promotion from a position in one department or agency to a position in another department or agency shall be for a probationary term…[t]he state civil service commission and municipal civil service commissions may provide, by rule, for probationary service upon intradepartmental promotion to positions in the competitive class and upon appointment to positions in the exempt, non-competitive or labor classes.[1]

Civil Service Law Section 63(2) provides that "[t]he state civil service commission and municipal civil service commissions shall, subject to the provisions of this section, provide by rule for the conditions and extent of probationary service."[2]

If an individual is permanently appointed to a position in the classified service[3] in New York State's Civil Service, as defined in Civil Service Law Sections 41 through 44, his or her status as a permanent employee commences on the effective date of the appointment, which appointment typically requires the individual to serve a probationary period.[4] The duration of the probationary period is typically set out in terms of completing a minimum period of probation and a maximum period of probation pursuant to the rules or regulations of the civil service commission having jurisdiction over the public employer.[5]

Probationary Status and Tenure Status Distinguished

An individual permanently appointed to a position in the classified service serving a probationary period is a permanent employee as of the effective date of his or her appointment. He or she does not attain "permanent status" upon the completion of the probationary period but, rather, attains tenure in the position unless he or she is given timely notice that he or she has not completed the probationary period satisfactorily and will be terminated. Courts are periodically required to address issues involving the dismissal of an employee from his or her position while serving in a probationary capacity prior to his or her completion of the maximum period of probation.[6]

The general rule applied by the courts in the event the appointing authority terminates an employee during his or her probationary period is that the appointing authority may terminate a probationary employee without notice or hearing at any time after he or she has completed the minimum period of probation[7] and prior to completion of his or her maximum period of probation, provided, however, such termination is not for an unlawful reason or purpose, i.e, the probationer's dismissal (1) was not made in bad faith; (2) did not constitute a violation of statutory or decisional law; or (3) was not based on any unconstitutional or illegal reasons.[8]

In contrast, should the appointing authority wish to terminate an employee during his or her minimum period of probation, the probationer must be served with disciplinary charges and given a due process hearing in accordance with Civil Service Law Section 75 or an equivalent disciplinary procedure set out in a collective bargaining agreement.[9]

A Gem of a Case: *Civil Service Employees Association v. Freeport Housing Authority*

Matter of Civil Service Employees Association [CSEA] *v. Freeport Housing Authority*,[10] is a gem of a decision, addressing a myriad of issues resulting from an appointing authority's effort to remove an employee permanently appointed to the position, who had completed the minimum period of probation but prior to having completed the maximum period of probation. The decision also considered the impact of a provision in a collective bargaining agreement (CBA) that set out a notice requirement in the event the employee was to be continued in service as a probationary employee beyond the minimum period of probation.

Cheryl Scott was appointed by Freeport Housing to a vacant position as a provisional employee.[11] Scott subsequently was appointed to the position as a permanent employee subject to her satisfactory completion of a probationary period.[12] Scott, however, was terminated from the position after completing her eight-week minimum period of probation but prior to the completion of her twenty-six week maximum period of probation without notice and hearing.[13]

A provision in the relevant CBA, however, provided that (1) the probationary period for employees in the negotiating unit was a minimum of eight weeks and a maximum of twenty-six weeks, and (2) a probationary employee would become tenured in the position upon the completion of his or her minimum period of probation unless the appointing authority gave the employee written notice that his or her probationary term would be continued beyond the minimum period of probation.[14]

Both the employee, Cheryl Scott, and the CSEA President, John Shepherd, testified that Scott's minimum probationary period was eight weeks and she had not received any notice by the appointing authority that it was to be extended.[15] CSEA contended that as Scott was continued in the position beyond her minimum period of probation, she had attained tenure and could only be terminated after "notice and hearing"[16] pursuant to Section 75 of the Civil Service Law or an alternate disciplinary procedure set out in a collective bargaining agreement.[17]

In effect, CSEA argued that Scott, having completed the minimum of her probationary period without the appointing authority advising her that her probationary period was extended as required by the CBA, had attained tenure by estoppel.[18] Thus, contended CSEA, Freeport Housing had violated the parties' CBA—which required that a tenured employee be given prior notice of, and the reason(s) for his or her termination of employment—and CSEA could grieve Scott's termination of employment, through and including submitting the issue to arbitration.[19]

Freeport, on the other hand, argued that Scott was a still probationary employee as, although she had completed her minimum period of probation, she had not yet completed her maximum period of probation and thus was not an employee with tenure for the purposes of challenging her termination through arbitration.[20]

The Appellate Division concluded that Scott was a permanent employee and had attained tenure in the position when her period of probation was not extended prior to her completion of the eight-week minimum period of probation.[21] Accordingly, Scott was entitled to the protections set out in the CBA as the result of Freeport's failure to timely notify Scott that her probationary period was being extended beyond the minimum period of probation.[22] Further, said the court, CSEA's challenge to Scott's termination could be submitted to arbitration.[23]

The Significance of the Collective Bargaining Agreement: *Gordon v. Town of Queensbury*

Another significant probationary termination decision was handed down by the Appellate Division in *Gordon v. Town of Queensbury*.[24]

Michael Gordon was terminated from his position by the Town of Queensbury before he completed his probationary period.[25] He challenged the town's action, contending that the town failed to give him the written pre-termination notice required by rules promulgated by the Warren County Civil Service Commission and thus his termination was made "in bad faith."[26]

Rule XIV.5 of the Warren County Civil Service Commission required that "a probationer whose services are to be terminated for unsatisfactory performance receive written notice of such termination at least one week prior thereto."[27] Here, however, the Appellate Division decided that "the disciplinary provisions" set out in a collective bargaining agreement negotiated pursuant to the Taylor Law trumped the Commission's rules.[28] In its analysis of the case, the court pointed out that:

1. A county civil service commission has the authority to promulgate rules for the "conditions and extent of probationary service" which have the force and effect of law;[29]
2. "A violation of such rules may be sufficient to trigger a trial on the issue of bad faith;"[30] and
3. The former employee "bears the burden of presenting competent proof that his or her dismissal was made in bad faith."[31]

But, the court said, "[i]t is equally true…that the disciplinary procedures set forth in a collective bargaining agreement may be substituted for statutory

procedures, in which case an employee is 'entitled to no more procedural protections than those expressly afforded him [or her] under the collective bargaining agreement.'"[32]

The Appellate Division was persuaded that the collective bargaining between Queensbury and Gordon's collective bargaining representative, CSEA, governed the discipline and dismissal of probationary employees and therefore any alleged violation of the Commission's rules by the town did not provide any basis for Gordon's claim of bad faith.[33] As Gordon "failed to tender proof sufficient to raise a triable issue of fact in this regard," the court decided that no hearing was required concerning the town's motivation in discharging him from the position and dismissed the appeal.[34]

Another Collective Bargaining Agreement Case: *Chemung County v. CSEA*

Interpreting the provisions of a collective bargaining agreement in connection with a probationary period was also the major issue in *Chemung County v. CSEA*.[35]

In contrast to the ruling in *Gordon*, the *Chemung County* decision demonstrates that a Taylor Law agreement may contain a clause that could become a "landmine" if ignored by the arbitrator and ultimately result in a court vacating an arbitration award issued pursuant to the agreement's "contract arbitration clause."

The collective bargaining agreement negotiated by Chemung County and the Civil Service Employees Association provided that the interpretation of its provisions was to be governed by the relevant provisions of the Civil Service Law and the County's local laws.[36] Finding that the arbitrator failed to consider this aspect of the agreement in resolving a contract dispute between the parties, the Appellate Division affirmed the lower court's decision vacating the arbitrator's award in favor of CSEA.[37]

The Appellate Division explained:

> [T]he arbitration clause in the agreement provides that the arbitrator's award shall be final and binding except that "in the event either party determines that the arbitrator has varied the terms or illegally interpreted the terms of [the agreement]"…such aggrieved party shall have the right to submit that sole issue to the Court… and the Court shall have jurisdiction of that particular issue.[38]

The general rule applied in such cases is that "a contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect."[39]

The Appellate Division held that the rules for the classified service adopted by the Chemung County/City of Elmira Regional Civil Service Commission contained a provision that, on its face, appeared to govern whether the appointment of the employee, Brian Kennedy, to a higher level position on a temporary basis prior to the expiration of his original fifty-two week probationary period constituted a promotion that could trigger the replacement of the original probationary period.[40]

The court found that the arbitrator failed to consider the impact of that provision in formulating the award.[41] As the agreement required the arbitrator "to give due consideration to such civil service rules when rendering his interpretation," that provision constituted a specifically enumerated limitation on the arbitrator's power.[42] According to the court, when the arbitrator failed to recognize that his interpretation was controlled by that provision in the CBA, the arbitrator effectively deleted that term in contravention of an express limitation on his power.[43] In other words, the arbitrator's award must be consistent with the relevant provisions of the Civil Service Law and the controlling commission's relevant regulations.[44] The arbitrator's award was not so consistent, and this constituted a fatal defect. The Appellate Division ruled that vacating the challenged arbitration award and remitting the matter to a new arbitrator for reconsideration was the appropriate remedy.

Among the elements that the new arbitrator would have to consider are the following:

1. Has Commission promulgated a rule similar to 4 NYCRR 4.5(i)?[45]
2. If such a rule was in place, does the appointing authority have any discretion to consider Kennedy's employment in the higher-level position as counting towards his satisfying the probationary requirements of the lower level position and, if so, what was Kennedy told?
3. Assuming Kennedy's service in the higher level position was deemed unsatisfactory, do the Chemung County rules allow Kennedy the option of returning to his lower grade position "for sufficient time to permit him or her to complete his probationary term in that position?"[46]
4. Assuming that the arbitrator determines that Kennedy has not completed the minimum period of probation required for the position of Social Welfare Examiner Trainee, what are the County's options?[47]

Challandes v. Shew

Challandes v. Shew[48] is another case involving an attempt by the appointing authority to remove an employee prior to the end of her minimum probationary period. The Village of Ossining appointed Joyce Challandes as a permanent Data Entry Operator, subject to her satisfactorily completing her probationary period. A few days later the Village Manager revoked the appointment. Challandes sued, claiming that her termination was unlawful. A State Supreme Court justice agreed and directed Ossining to reinstate her to the position with all back salary and the other benefits that she would have received had her appointment not been revoked.[49]

The Village appealed, only to have the lower court's determination affirmed by the Appellate Division.

Under Westchester County's Civil Service Rule 11.1(a)(1), explained the Appellate Division, Challandes had to serve a minimum of twelve weeks before she could be removed at the discretion of the appointing authority.[50] Any earlier termination would have to be based on her having to be found guilty of charges of incompetence or misconduct pursuant to Civil Service Law Section 75 or an equivalent disciplinary procedure providing due process set out in a collective bargaining agreement.[51] As Challandes had not been served with disciplinary charges and no disciplinary hearing was conducted, the court ruled that Challandes' termination was unlawful.[52]

A Second Bite of the Apple

In some instances, where an appointing authority is not persuaded that the probationary employee should continue in the position beyond his or her probationary period, it may wish to give the probationer "a second chance." The Rules of the State Civil Service Commission, which apply to State employees and employees of certain other entities, provide for such an opportunity.

Specifically, 4 NYCRR 4.5(b)(5)(ii) provides that in the event the "[c]onduct or performance of a probationer is not satisfactory, his or her employment may be terminated at any time after eight weeks and before completion of the maximum period of service." The Rule further provides that the appointing officer

> [M]ay, however, in his discretion, offer such probationer an opportunity to serve a second probationary term of not less than 12 nor more than 26 weeks in a different assignment, in which case the appointment may be made permanent at any time after completion of 12 weeks of service, or the employment terminated at any time after the completion of 8 weeks of service and on or before the completion of 26 weeks of service.[53]

Few other civil service commissions have rules providing for such an extension of an appointee's probationary service.

Critical Dates: A Moving Target

There are other considerations that may be relevant when making personnel decisions involving employees then serving as probationers.

The critical dates of a probationary period based on the minimum and the maximum period of probation may be a moving target. For example, a probationary employee's absence during his or her probationary period automatically extends the employee's probationary period for an equal amount of time.[54]

However, an appointing authority may have some discretion with respect to waiving a limited period of such absence pursuant to the rules of the responsible civil service commission.[55]

For example, 4 NYCRR 4.5(g) addresses absences during the probationary term with respect to employees of the State and public authorities, public benefit corporations and other agencies for which the Civil Service Law is administered by the State Department of Civil Service and provides, in pertinent part:

> [A]ny periods of authorized or unauthorized absence aggregating up to 10 workdays during the probationary term, or aggregating up to 20 workdays if the probationary term or maximum term exceeds 26 weeks, may, in the discretion of the appointing authority, be considered as time served in the probationary term…. [A]ny such periods of absence not so considered by the appointing authority as time served in the probationary term, and any periods of absence in excess of periods considered by the appointing authority as time served in the probationary term pursuant to this subdivision, shall not be counted as time served in the probationary term. The minimum and maximum periods of the probationary term of any employee shall be extended by the number of workdays of his absence which, pursuant to this subdivision, are not counted as time served in the probationary term.[56]

Many local civil service commissions have adopted a similar rule.[57]

Thus, the minimum and maximum periods of the probationary term of the employee are automatically extended by the number of workdays of such absences not counted as time served in the probationary term.

Alternative Work Assignments and Other Considerations

Another factor to consider is the extension of the probationary period in the event an employee is assigned to perform "light duty" or some alternative work during his or her probationary period. Such assignments are not considered in determining the employee's probationary service in the position and the employee's probationary period is automatically extended for a period equal in length to such alternate assignment.[58]

As an example, in *Boyle v. Koch,* two probationary firefighters, Davenport and Manzella, were injured on the job.[59] They were given extended sick leave and later provided with light duty assignments for more than a year.[60] As a result, the Fire Commissioner extended their respective probationary periods.[61] The genesis of Davenport and Manzella's appeal was that both had applied for accident disability retirement, and their benefits would be diminished if they retired as probationary firefighters rather then tenured firefighters.[62] An accident disability retirement allowance is equal to three-quarters of an employee's final compensation on the date of his or her retirement.[63] Thus, if Davenport and Manzella had retired for accident disability as tenured firefighters, they would have received three-quarters of firefighter third-class pay as opposed to receiving three-quarters of firefighter fourth-class pay—a lesser amount.

In response to their challenge to this determination, the Appellate Division[64] ruled that the extension of the probationary period was proper. The firefighters, not having performed the full duties of firefighter for the maximum period of probation, could not claim tenure rights on the basis of their satisfactory performance of "light duty."[65] The decision points out that an employer is entitled to evaluate the worker's fitness for appointment in terms of probationary performance in his or her "normal" assignment.[66] As neither firefighter had completed the probationary period performing their full duties, their status as probationary firefighters was held lawful.[67]

Not all such absences result in an extension of the probationary period, however. In the event a probationer enters military duty within the meaning of Section 243 of the Military Law,[68] the time of his or her absence on such military duty is credited as satisfactory service during his or her probationary term.

A layoff involving probationary employees also requires special consideration. Section 80.1 of the Civil Service Law provides, in pertinent part:

> [U]pon the abolition or reduction of positions in the competitive class, incumbents holding the same or similar positions who have not completed their probationary service shall be suspended or demoted, before any incumbents who have completed the required probationary period and as to such probationary employees, the order of suspension or demotion shall be determined as if such employees were permanent incumbents.[69]

This means that the date of the probationer's "original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs" will determine the individual's layoff rights and position on a preferred list.[70]

Reinstatement from a preferred list provides another example of the complexity of evaluating the rights of an employee having probationary status. Section 81.4 of the Civil Service Law provides:

> Notwithstanding the provisions of subdivisions two and three of this section [§81], no person suspended or demoted prior to the completion of his probationary term shall be certified for reinstatement until the exhaustion of the preferred list of all other eligibles thereon. Upon reinstatement, such probationer shall be required to complete his probationary term.[71]

Notice of Termination Date Considerations

As noted earlier, it is well settled that in the event a probationary employee is continued in service beyond the last day of the maximum probationary period and was not given a timely notice that he or she was to terminated at the end the probationary period; or that his or her probationary period has been extended beyond the maximum period; or that he or she has been offered, and accepted, a second probationary period in lieu of termination, the employee becomes "tenured" in the position and thereafter may only be removed for cause after notice and hearing. This is referred to as attaining tenure by estoppel.[72]

Assume, however, that the employee is given his or her notice of termination on the last day of the employee's probationary period and the employee is continued on the payroll beyond the last day his or her probationary period.[73] This, courts have ruled, consti-

tutes a timely and effective notice of termination of the probationary employee as the last day of service need not coincide with the last day of the probationary period.[74]

As the Appellate Division held in *Mendez v. Valenti*,[75] so long as the effective date of termination is within a reasonable time, such as set to coincide with the end of the next payroll period, the courts will not deem the probationer to have obtained tenure by estoppel because of his or her continuation on the payroll after the last day of his or her probationary period.

Stated another way, the appointing authority has until the last day of the individual's probationary period to decide whether to retain the employee, extend the employee's probationary period by offering the individual a "second" probationary period, or to terminate the employee from his or her position. The effective date of the employee's removal from the payroll may occur after this date, but the required notice of the termination must be delivered to the employee before the end of his or her probationary period.[76]

In some instances an employee may attain tenured permanent status by operation of law. For example, Civil Service Law Section 65.4 provides that if an individual whose name is on a nonmandatory eligible list is serving provisionally in the position and he or she is continued in service as a provisional employee beyond the maximum probationary period otherwise required, he or she attains tenured status by operation of law.[77]

In contrast, if the provisional employee is eligible for appointment from a mandatory eligible list, he or she cannot claim to have attained tenured status pursuant to Section 65.4 regardless of the duration of his or her provisional appointment.[78]

Traineeship Requirements

In some cases the probationary employee is required to satisfactorily complete probation and complete a traineeship. These are two different requirements that must be met by the appointee, and he or she must satisfy both conditions in order to continue in the position.[79] Where the successful completion of a traineeship is required in order to be continued in service, that condition should be communicated to the individual in the examination announcement or in the offer of his or her appointment to the position.

As to the authority for requiring the completion of a traineeship, the rules of the State Civil Service Commission, which apply to employees in the classified service of the State and public authorities, public benefit corporations and other agencies for which the Civil Service Law is administered by the State Department of Civil Service provide as follows:

> The Civil Service Department may require that permanent appointments or promotions to designated positions shall be conditioned upon the satisfactory completion of a term of service as a trainee in such a position or in an appropriate, lower, training title or the completion of specified training or academic courses, or both. The period of such term of training service shall be prescribed by the department. Upon the satisfactory completion of such training term, and of specified courses if required, an appointee shall be entitled to full permanent status in the position for which appointment was made. Any appointment hereunder shall be subject to such probationary period as is prescribed in [Section 4.5 of] these rules. Also, the employment of such person may be discontinued at the end of the term of training service if his conduct, capacity or fitness is not satisfactory, or at any time if he fails to pursue or continue satisfactorily such training or academic courses as may be required.[80]

Local civil service commissions may have adopted similar rules.

Name-Clearing Hearings

One last consideration. An employee terminated from his or her position after completing the minimum period of probation but at or before the end of his or her maximum period of probation may be entitled to a "name-clearing hearing."

A name clearing hearing, however, serves only one purpose—to provide the individual with an opportunity to clear his or her "good name and reputation" in situations where he or she alleges that information of a stigmatizing nature has been made public by the employer.[81] Prevailing at a name-clearing hearing does not entitle the individual to reinstatement or to reemployment in his or her former position.[82] This means that being provided with a hearing and thereby clearing his or her name is all the relief an individual can expect.[83]

In considering an individual's right to a name-clearing hearing the courts typically reject such an application if the individual fails to show that the employer had publicly disclosed the allegedly stigmatizing reasons for his or her dismissal or demotion.[84]

Further, on the issue of "public disclosure," courts have ruled that the internal disclosure of allegedly stigmatizing reasons for the discharge or demotion of an employee to agency administrators "having a right to

know" does not constitute a public disclosure of such information and thus, a name-clearing hearing was not required because of such intra-agency communications.[85] The mere possibility of dissemination in the future is only speculative and is insufficient to warrant a hearing.[86]

To summarize: New York courts have directed "name-clearing hearings" for probationary employees (and for employee serving without tenure) who have been "stigmatized" as a result of "State action" and the employer has made such "stigmatizing" information public.[87]

What have the courts considered to be stigmatizing? "Name-clearing hearings" have been ordered in cases involving dismissals because of alleged mental instability, dishonesty, incompetence, rape and sexual molestation, narcotic addiction, being psychologically unfit, and misconduct involving public funds.[88]

In addition, courts have ruled that a name-clearing hearing is warranted even if there has been no publication concerning the reason for the employee's dismissal in cases where it determines that discharging the employee for the reasons stated does, in fact, stigmatize the individual and may adversely affect the individual's prospects for future employment.[89]

Endnotes

1. N.Y. Civ. Serv. Law § 63(1) (McKinney 2013).
2. N.Y. Civ. Serv. Law § 63(2) (McKinney 2013).
3. *Compare* N.Y. Civ. Serv. Law §§ 41-44 (McKinney 2013) (providing for the placement of positions in the civil service in the classified service into four jurisdictional classifications), *with* N.Y. Civ. Serv. Law § 35 (McKinney 2013) (designating certain positions in the civil service as being in the Unclassified Service). In addition, certain individuals may serve in the military service of the State as described in § 2 of the State's Military Law.
4. N.Y. Civ. Serv. Law § 63(1) (McKinney 2013).
5. N.Y. Civ. Serv. Law § 63(2) (McKinney 2013).
6. *See, e.g.*, York v. McGuire, 469 N.E.2d 838, 839 (N.Y. 1984). The New York Court of Appeals set out the basic rule on dismissal of probationary employees as follows:

   > [After completing his or her minimum period of probation and prior to completing his or her maximum period of probation,] a probationary employee may be discharged without a hearing and without a statement of reasons, [as long as there is no proof] that the dismissal was for a constitutionally impermissible purpose, or in violation of statutory or decisional law, [or made in bad faith].

   Id. *See also* N.Y. Civ. Serv. Law § 75 (McKinney 2013) (generally requiring that the appointing authority wishing to terminate a permanent employee serve disciplinary charges pursuant to this section or the appropriate contract disciplinary procedure). In accordance with *York*, a permanent employee that the appointing authority wishes to terminate during his or her minimum period of probation must be served with disciplinary charges in accordance with § 75 of the Civil Service Law or the appropriate contract disciplinary procedure.
7. The rationale advanced by the courts for this exception is that an individual is entitled to a minimum period of service to demonstrate his or her ability to satisfactorily perform the duties of the position.
8. *See* York v. McGuire, 469 N.E.2d 838 (N.Y. 1984)

   > It is well settled that a probationary employee may be discharged without a hearing and without a statement of reasons [after completing his or her minimum period of probation and prior to his or completion of his or maximum period of probation] in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law.

   Id.
9. Challandes v. Shew, 712 N.Y.S.2d 593 (2d Dep't 2000).
10. Civil Service Employees Ass'n v. Freeport Housing Authority, 975 N.Y.S.2d 79 (2d Dep't 2013).
11. *Id.* at 79.
12. *See* N.Y. Comp. Codes R. & Regs. tit. 4, § 4.5(a) (2013)

    > It is the intent of the Civil Service Commission that permanent appointments, promotions or transfers shall require, as provided herein, satisfactory completion of a probationary term which shall include a minimum and a maximum period of probation. Such probationary term shall commence on the effective date designated by the appointing authority and approved by the Civil Service Department for the appointment, promotion or transfer on a permanent basis. Such appointments, promotions or transfers shall not become permanent prior to satisfactory completion of at least the minimum period and may require satisfactory completion of the maximum period of probation. If the conduct or performance of a probationer is not satisfactory, his or her employment may be terminated at any time after eight weeks and before completion of the maximum period of probation.

    Id. See also N.Y. Comp. Codes R. & Regs. tit. 4, § 1.1 (2013) ("Except as otherwise specified in any particular rule, these rules shall apply to positions and employments in the classified service of the State and public authorities, public benefit corporations and other agencies for which the Civil Service Law is administered by the State Department of Civil Service"). Many local civil service commissions have adopted similar rules with respect to probationary periods applicable to employees appointed by public entities subject to its jurisdiction.
13. Upon completion of his or her minimum period of probation a provisional employee generally is not entitled to a pre-termination hearing unless her or she demonstrates that the dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law. *See* Stanziale v. Executive Dep't., Off. Of Gen. Servs., 431 N.E.2d 635, 636 (N.Y. 1981); Browne v. City of New York, 845 N.Y.S.2d 120, 120 (2d Dep't 2007) (providing "name clearing hearings" to provisional or probationary employees who were allegedly stigmatized as a result of the nature of charges causing their dismissal or non-appointment being publicized by the appointing authority). The author is not aware of any court decision directing the reinstatement of an employee who prevailed at his or her name-clearing hearing to his or her former position.

14. *Freeport Housing Authority*, 975 N.Y.S.2d at 80.
15. *Id.*
16. The employee organization contended, in effect, that the employee had acquired "tenure by estoppel."
17. N.Y. Civ. Serv. Law § 76(4) (McKinney 2013).
18. S*ee* N.Y. Comp. Codes R. & Regs. tit. 4, § 4.5(b)(5)(i) (2013) ("An appointment, promotion or transfer shall become permanent upon the retention of the probationer after his or her completion of the maximum period of service or upon earlier written notice following completion of the minimum period that his or her probationary term is successfully completed…"). Many local commissions have adopted a similar provision.
19. *Freeport Housing Authority*, 975 N.Y.S.2d at 79.
20. *Id.* at 80.
21. *Id.* at 79.
22. *Id.*
23. *Id.* at 80.
24. Gordon v. Town of Queensbury, 681 N.Y.S.2d 406 (3d Dep't 1998).
25. *Id.* at 407.
26. *Id.*
27. *Id.*
28. *Id.* at 408.
29. N.Y. Civ. Serv. Law § 20(2) (McKinney 2013).
30. *Gordon*, 681 N.Y.S.2d at 407.
31. *Id.*
32. *Id.* at 407.
33. *Id.* at 408.
34. *Id.*
35. Chemung County v. Civil Service Employees Ass'n., 716 N.Y.S.2d 734 (3d Dep't 2000).
36. 716 N.Y.S.2d at 736.
37. *Id.*
38. *Id.* at 735.
39. *Id.* at 736.
40. *Id.*
41. Chemung County v. Civil Service Employees Ass'n., 716 N.Y.S.2d 734, 736 (3d Dep't 2000).
42. *Id.*
43. *Id.*
44. *See* N.Y. Comp. Codes R. & Regs. tit. 4, § 4.5(i) (2013) (applying to positions and employments in the classified service of the State and public authorities, public benefit corporations, and other agencies for which the Civil Service Law is administered by the State Department of Civil Service). Similar provisions have been adopted by many local civil service commissions.
45. *See* N.Y. Comp. Codes R. & Regs. tit. 4, § 4.5(i) (2013) (applying to a probationary employee serving in a higher level position as a temporary or provisional employee) ("[T]he employment of such a probationer in his lower position shall not be terminated at the end of his probationary term on account of unsatisfactory service unless he shall have actually served in such position, in the aggregate, at least a period of eight weeks.").
46. *See id.* ("In the event of an adverse decision by the appointing authority, such probationer, at his request, shall be returned to his lower position for sufficient time to permit him to complete his probationary term.").
47. In this situation, it appears that if the appointing authority wishes to remove Kennedy, if he has not completed the minimum period of probation for the position, it must comply with the provisions of Section 75, or the disciplinary procedures set out in the collective bargaining agreement. If, on the other hand, Kennedy had completed his minimum period of probation, he may be lawfully terminated without notice or hearing prior to the end of the maximum period of probation.
48. Challandes v. Shew, 712 N.Y.S.2d 593 (2d Dep't 2000).
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. N.Y. Comp. Codes R. & Regs. tit. 4, § 4.5(b)(5)(ii) (McKinney 2013).
54. N.Y. Comp. Codes R. & Regs. tit. 4, § 4.5(g) (McKinney 2013).
55. *Id.*
56. *Id.*
57. *See* Westchester County, N.Y., Civ. Serv. R. § 11.2 (2002)

    > Any periods of authorized absence aggregating up to ten (10) work days during the probationary term, may, in the discretion of the appointing authority, be counted as time served in the probationary term. Any such periods of absences in excess of an aggregate of ten (10) work days, shall not be counted as time served in the probationary term. The minimum and maximum periods of the probationary term of any employee shall be extended by the number of work days of his absence which, pursuant to this section, are not considered as time served in the probationary term.

    Id. But cf., Suffolk County, N.Y., Civ. Serv. R. § 1200-14(f) (1992) ("At the discretion of the appointing authority, any period of absence during probation may be added to the probationary period as long as the employee is so notified").
58. *Id.*
59. Boyle v. Koch, 497 N.Y.S.2d 663 (1st Dep't 1986), *cert. denied*, 496 N.E.2d 239 (N.Y. 1986).
60. *Boyle*, 497 N.Y.S.2d at 664.
61. *Id.*
62. *Id.*
63. N.Y.C. Admin. Code § 13-364 (2013).
64. *Id.*
65. *Id.* at 665.
66. *Id.*
67. Boyle v. Koch, 497 N.Y.S.2d 663 (1st Dep't 1986), *cert. denied*, 496 N.E.2d 239 (N.Y. 1986).
68. *See* N.Y. Mil.Law § 243(9) (McKinney 2011) (providing that time spent absent on military duty shall be credited as satisfactory service during a probationary period); *see also* N.Y. Mil. Law § 243(9)(a) (McKinney 2011) (providing a similar benefit to teachers).
69. N.Y. Civ. Serv. Law § 80(1) (McKinney 2013).
70. *Id.*
71. N.Y. Civ. Serv. Law § 81(4) (McKinney 2011).
72. Although tenure by estoppel is most frequently encountered in connection with claims of tenure advanced by probationary teachers who have been terminated, it is possible for employees holding positions in the competitive class to attain tenure by estoppel as the Fairport decision, above, demonstrates.

73. This may not be the case where the rules of the responsible civil service commission provide otherwise. For example, Westchester County, N.Y., CIV. SERV. RULE § 11.1(d) (2002) provides as follows:

> If the conduct or performance of a probationer is not satisfactory, his/her employment may be terminated *at any time after the completion of the minimum period of service, and on or before completion of the maximum period of service. A probationer whose services are to be terminated, shall receive written notice at least one week prior to such termination*, and copy of such notice shall be sent to the Commissioner of Human Resources.

Id. (emphasis added).

74. *See* Marasco v. Morse, 9 Misc.2d 296, 301, *aff'd*, 34 N.Y.S.2d 823, *aff'd*, 46 N.E.2d 364 (N.Y. 1943) (holding that an employee whose pay period expired the day after the expiration of his probationary term did not entitle him permanent status); *see also* Rosenberg v. Wickham, 320 N.Y.S.2d 567 (3d Dep't 1971) (holding that when proper notice of termination is given, a probationary employee kept beyond the probationary period will not obtain permanent status).

75. Mendez v. Valenti, 474 N.Y.S.2d 868 (3d Dep't 1984).

76. *Mendez*, 474 N.Y.S.2d at 870.

77. Roulett v. Town of Hempstead Civil Servivce Comm'r., 335 N.Y.S.2d 1008 (2d Dep't 1972).

78. Becker v. New York State Civil Service Comm'n, 461 N.E.2d 860 (N.Y. 1984).

79. *See* N.Y. CIV. SERV. LAW § 63(1) (McKinney 2013):

> Notwithstanding the foregoing or any other law or rule to the contrary, when a permanent appointment or promotion to a position in the competitive class is conditioned upon the completion of a term of training service or of a period of service in a designated trainee title, such service and the probationary term for such competitive position shall run concurrently.

Id.

80. N.Y. COMP. CODES R. & REGS. tit 4, § 4.3 (McKinney 2013).

81. Browne v. City of New York, 900 N.Y.S.2d 898 (2d Dep't 2010).

82. Iritano v. New York City Tr. Auth., 573 N.Y.S.2d 756 (2d Dep't 1991).

83. The author of this article is not aware of any court decision directing the reemployment of a plaintiff who prevailed at his or her "name-clearing hearing."

84. Ortiz v Ward, 546 N.Y.S.2d 624 (1st Dep't 1989).

85. *See* Bishop v. Wood, 426 U.S. 341 (1976) ("Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his "good name, reputation, honor, or integrity' was thereby impaired.").

86. Carlo v. City of New York, 549 N.Y.S.2d 160 (2d Dep't 1989).

87. Lentlie v. Eagan, 462 N.E.2d 1185 (N.Y.1984) (indicating that a name-clearing hearing was available to an employee who was terminated on the basis of unsatisfactory performance "only if the (public) employer creates and disseminates a false and defamatory impression about the employee in connection with his termination…." (quoting Codd v. Velger, 429 U.S. 624, 627 (1977))).

88. *See* Ranus v. Blum, 467 N.Y.S.2d 740, 741 (4th Dep't 1983) (concerning mental disability); *see also* Salvatore v. Nasser, 440 N.Y.S.2d 92, 93 (4th Dep't 1981) (concerning dishonesty and frauds); Horowitz v. Roche, 417 N.Y.S.2d 700, 701 (1st Dep't 1979) (concerning incompetence of only applicant to pass competitive examination); Perry v. Blair, 374 N.Y.S.2d 850, 851 (4th Dep't 1975) (concerning a probationary patrolman charged with rape and sexual molestation); Reeves v. Golar, 357 N.Y.S.2d 86 (1st Dep't 1974) (involving termination due to a narcotic addiction); Stearns v. Gilchrist, 378 N.Y.S.2d 312 (Sup. Ct. Orange County 1976) (concerning physchological unfitness); Mengrone v. New York City Off-Track Betting Corp., 371 N.Y.S.2d 525, 526 (Sup. Ct. 1974) (concerning misconduct involving public funds).

89. Donato v. Plainview-Old Bethpage Central School District, 96 F.3d 623 (2d Cir. 1996); Brathwaite v. Manhattan Children's Psychiatric Ctr., 417 N.Y.S.2d 485 (1st Dep't 1979).

Harvey Randall served as Principal Attorney, New York State Department of Civil Service. He also served as Director of Personnel for the State University System, as Director of Research, Governor's Office of Employee Relations, and Staff Judge Advocate General, New York Guard. He received his MPA from the Maxwell School, Syracuse University and his J.D. from Albany Law School. Co-author of a number of books concerning public employment in New York State including *The Discipline Book* and *Layoff, Preferred Lists and Reinstatement in the Public Service*, Randall maintains a law blog, New York Public Personnel Law at http://publicpersonnellaw.blogspot.com.

Climate Change Adaptation and Mitigation: A Local Solution to a Global Problem

By Sarah Adams-Schoen

"Adapt or perish, now as ever, is Nature's inexorable imperative."[1]

Introduction

Natural disasters like Super Storm Sandy bring the confluence of environmental and municipal law into sharp focus. Although natural disasters almost inevitably take us by surprise, the fact that they will occur and recur is in fact foreseeable. Global temperatures are increasing and the rate of increase is accelerating—with accelerating increases in sea levels, acidification of oceans, and losses of flood-mitigating wetlands. Storms and other extreme weather events are increasing in frequency and severity. We can predict that New York's future holds more massive storm surges, heavy rains and winds, major heat waves, and other extreme weather conditions.

Nor are environmental disasters simply uncontrollable acts of nature. Rather, they are at least in part attributable to failures of the legal system to effectively assess and mitigate risks. As Berkeley Law Professor Daniel Farber observes, "environmental disasters stem from gaps in environmental regulation: weak protection of wetlands, badly planned infrastructure, and, above all, climate change."[2]

As a result, state and local governments must continue to work toward a more resilient[3] future by implementing climate change[4] mitigation[5] and adaptation[6] measures. Local decision makers, resource managers, planners, and attorneys must evaluate the most current data and ask themselves whether their municipalities are doing enough to mitigate and adapt to climate change. Failure to do so will continue to be costly in terms of property and lives.

Super Storm Sandy

New York is experiencing the impacts of climate variability and change in the form of increasing annual air temperature, more frequent and intense flooding events, and more frequent and intense coastal storms. Almost one year ago today, "Super Storm Sandy" combined with a storm that was traveling west to east, striking the East Coast at high tide. The barometric pressure in Sandy was one of the lowest ever recorded. The storm completely devastated the coastline from Cape May, New Jersey, to New York Harbor, Seagate and Staten Island, and the coastline from New York to Connecticut.

The impact on New York was devastating. Forty-three New Yorkers lost their lives. The tidal surge from Super Storm Sandy flooded the New York Port Authority Trans-Hudson subway tunnels, the New York subways, and the Brooklyn Battery Tunnel. The storm shut down access to New York City by highway, rail and air for almost a week; related power outages lasted for weeks in some areas. Sandy was the most expensive storm in U.S. history, estimated to cost approximately $71 billion in damages.[7]

These and other climate-related impacts are expected to continue to manifest and increase in intensity as a result of the accumulation of greenhouse gases in the atmosphere.

Climate Change: The New Normal

Although scientists debate whether climate change *caused* Super Storm Sandy, scientists tend to agree that climate change contributes to the severity of storms and will lead to more extreme storms in the future. Columbia University Professor Cynthia Rosenzweig, a noted climate scientist, and co-chairwoman of the New York City Panel on Climate Change (NPCC),[8] identified compelling areas of linkage between Super Storm Sandy and climate change, including rising sea levels that made storm surges higher.[9] According to the IPCC,[10] "it is likely that future tropical cyclones (typhoons and hurricanes) will become more intense, with larger peak wind speeds and more heavy precipitation associated with ongoing increases of tropical sea surface temperatures."[11] In a recent study, researchers, including NASA climatologist James Hansen, explained, "[w]e can state, with a high degree of confidence, that extreme anomalies were a consequence of global warming because their likelihood in the absence of global warming was exceedingly small."[12] In 2006, underwriters at Lloyd's of London issued a report entitled "Climate Change: Adapt or Bust," in which they concluded that "[f]ailure to take climate change into account will put companies at risk of future legal actions from their own shareholders, their investors and clients." According to a United Nations Environment Program Finance Initiative report, climate-change-driven natural disasters may lead

to economic losses of $150 billion per year within the next decade.

Thus, not surprisingly, former New York City Mayor Michael Bloomberg recently lamented, "we are sobered by the 'new normal' that climate change is producing in our city, including more frequent and intense summer heat waves and more destructive coastal storms like Hurricane Sandy."[13] And, these sobering predictions are backed up by the most recent scientific assessments. The Fourth Assessment Report of the IPCC concluded that evidence of global warming is "unequivocal" and is caused primarily by human activities.[14] The Fifth Assessment Report of the IPCC (AR5) closely examined the uncertainties in the science. Despite numerous recognized uncertainties, AR5 confirmed that:

> Warming of the climate system is *unequivocal*, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, sea level has risen, and the concentrations of greenhouse gases have increased.[15]

Specifically, AR5 reported that there is "unequivocal" evidence of increased atmospheric concentrations of greenhouse gases including carbon dioxide (CO_2), methane (CH_4), and nitrous oxide (N_2O);[16] that it is "certain" global surface temperatures have increased since the late 19th century and are steadily increasing, with each successive decade being the warmest on record;[17] and, the evidence provides "very high confidence" that sea ice, ice sheets and glaciers are "persistently shrinking."[18]

Local data is equally alarming. According to the NPCC, sea level in New York City has risen 1.1 feet since 1900, and we can predict that it will continue to rise, at an increasing pace.[19] According to the most recent projections, higher sea levels are "extremely likely," with projected sea-level rises of as much as 2.5 feet by 2050.[20] In addition to increasing the height of storm surges, sea-level rise also causes dramatic losses in coastal wetlands, which buffer storm surges, thereby increasing exposure to flood damage as well as other harms such as saltwater intrusion into estuaries and drinking-water supplies.[21] Severe storms also result in further loss of coastal lands.[22]

By the 2050s, the middle-range projections suggest that coastal flood levels that currently occur an average of once per decade may occur once every three to six years. With the high-range projections, today's 1-in-100 year flood may occur approximately 5 times more often by the 2050s.[23] For New York City and other low-lying municipalities, if sea levels continue to rise as predicted, another storm like Sandy will result in more lost lives, more evacuations, more lost homes and businesses, and greater disruptions of critical infrastructure.[24] In economic terms, former-Mayor Bloomberg recently predicted that "while Sandy caused about $19 billion in [economic] losses for [New York City], rising sea levels and ocean temperatures mean that by the 2050s, a storm like Sandy could cause an estimated $90 billion in losses (in current dollars)— almost five times as much."[25] And, this estimate may be conservative.[26]

The data also strongly suggests that New York's future will include increasing annual air temperatures, heavier rains and stronger winds, more major heat waves, more frequent and intense coastal storms, and other more frequent and extreme weather conditions.[27] For example, the most recent NPCC report predicts that, by 2050, New York City could have as many days at or above 90 degrees annually as Birmingham, Alabama currently has. Heat waves are also predicted to more than triple in frequency and last on average one and a half times longer than they do today. Compounding this, "heat indices are very likely to increase, both directly due to higher temperatures and because warmer air can hold more moisture. The combination of high temperatures and high humidity can produce severe additive effects by restricting the human body's ability to cool itself and thereby induce heat stress."[28] Given that heat waves kill more Americans each year than all other natural disasters combined, the need to address the causes of increasing temperatures and heat indices is great.[29] The predictions certainly are sobering.

The Role of Municipalities: "Adapt or Perish"

Climate-induced weather extremes pose serious considerations for the core responsibilities of municipalities. According to some researchers, Sandy revealed how poor land-use decisions can exacerbate already destructive coastal storms.[30]

With global temperatures increasing—and resulting increases in sea levels, acidification of oceans, and losses of flood-mitigating wetlands—intense storms and other extreme weather events are increasing in frequency and severity. Nor are environmental disasters simply uncontrollable acts of nature. Rather, they are at least in part attributable to failures of the legal system to effectively assess and mitigate risks.

Local land use planning and development controls offer one of the most powerful tools for achieving natural-disaster resilient communities as well as communities that contribute to a decreased incidence of natural disasters.[31] As Touro Law Center Dean Patricia Salkin explains, local governments are on the "front line":

> Across the country, local governments maintain day-to-day responsibility and control over the use of the vast majority of lands that abut the nation's edge and other environmentally sensitive areas. Land use patterns are determined, infrastructure is designed and provided, and many other development issues are decided at the local level, where natural hazards are experienced and losses are suffered most directly.[32]

Pace Law Professor and Director of the Pace Land Use Law Center John Nolan echoes these sentiments, observing that "[l]ocal land use authority is the foundation of the planning that determines how communities and natural resources are developed and preserved, and how disaster resilient communities are created."[33] Local governments have an array of tools in their toolbox that can mitigate against and adapt their communities to climate change-related conditions—including building codes; land use, zoning, and subdivision regulations; comprehensive, capital improvement, transportation, floodplain management, stormwater management, and open space plans; facilities needs studies; population growth and future development studies; and economic development plans.[34]

Some Examples of Local Mitigation and Adaptation

Adopting a Local Hazard Mitigation Plan—Local hazard mitigation plans enable local governments to, among other things, secure hazard mitigation project grants. The local plans represent "the jurisdiction's commitment to reduce risks from natural hazards, serv[e] as a guide for decision makers as they commit resources to reducing the effects of natural hazards [, and]…serve as the basis for the State to provide technical assistance and to prioritize project funding."[35] The Disaster Mitigation Act of 2000 provides that, in order to qualify for federal hazard mitigation grants, state and local governments must "develop and submit for approval to the President a mitigation plan that outlines processes for identifying the natural hazards, risks, and vulnerabilities of the area under the jurisdiction of the government."[36]

Among other things, a local plan must include documentation of the planning process, including how the public was involved, and a risk assessment with "sufficient information to enable the jurisdiction to identify and prioritize appropriate mitigation actions to reduce losses from identified hazards." Moreover, the risk assessment must identify: (1) the type, location, and extent of all natural hazards that can affect the jurisdiction; (2) information on previous occurrences of hazard events and on the probability of future hazard events; (3) the jurisdiction's vulnerability to the hazards; and, (4) National Flood Insurance Program insured structures that have been repetitively damaged by floods. In identifying vulnerabilities, the plan must, among other things, describe land uses and development trends within the community so that mitigation options can be considered in future land use decisions.[37]

In January 2014, the New York City Office of Emergency Management (OEM), in partnership with the Department of City Planning, released the draft 2014 New York City Hazard Mitigation Plan (HMP). The HMP identifies the range of hazards facing the City and strategies to reduce the effects of these hazards. The 2014 draft HMP serves as an update to the 2009 New York City Natural Hazard Mitigation Plan. The public comment period for the draft HMP closed on January 15, 2014. The draft HMP is now awaiting review by New York State Division of Homeland Security and Emergency Services and approval by FEMA.[38]

Other municipalities that have incorporated climate-change-related hazards into their local HMPs include the City of New Rochelle, New York, and the Village of Larchmont, New York.[39] The Disaster Mitigation Act also provides for the creation of multi-jurisdictional HMPs, such as Nassau County's HMP.[40]

Setting Clear GHG Emission Reduction Targets—One significant step localities can take is to set quantifiable greenhouse gas emission reductions targets. Lewis & Clark Law Professor Melissa Powers argues that city climate action plans that fail to require *quantifiable* emissions reductions exalt the concept of "sustainability" over the governmental accountability necessary to have any hope of decreasing global CO_2 concentrations to 350 parts per million (ppm) or below, a level arguably necessary to avoid catastrophic temperature increases.[41]

Both the State of New York and New York City have set quantifiable emissions reductions targets.[42] In 2007, the New York City Mayor's Office laid out the city's climate change mitigation and adaptation goals, including reducing the city's greenhouse gas emissions by more than 30 percent by 2030.[43] The city recently reported that, in the last six years, the city's annual greenhouse gas emissions have dropped 16%.[44] The city's recent progress report attributes this success in part to the integration of sustainability goals into all the city's agencies and their operations. According to the progress report, the city "now spend[s] 10% of [its] annual energy budget—approximately $80 million—on funding energy efficiency measures in City government buildings."[45]

Revising Zoning, Building and Construction Codes to Prioritize Climate-Change Mitigation and Adapta-

tion—Protecting residents from natural disasters is a fundamental value and goal of local land use control.[46] As discussed above, many local land use zoning tools can protect communities from the effects of climate change and decrease communities' contributions of greenhouse gases, including land use, zoning, and subdivision regulations; comprehensive, capital improvement, transportation, floodplain management, stormwater management, and open space plans; facilities needs studies; population growth and future development studies; and economic development plans.[47]

The design and construction of buildings also plays a major role in resiliency. For example, in New York City, buildings account for nearly 75% of the city's total greenhouse gas emissions, 94% of the city's electrical consumption, 85% of its water usage, and much of the city's rainwater catchment area.[48] In response to this, Mayor Bloomberg and City Council Speaker Christine Quinn asked the New York Chapter of the U.S. Green Building Council to convene the NYC Green Codes Task Force to review current building and construction codes and make recommendations on how they could be amended to promote more sustainable practices, including specifically: (1) examining construction, fire, water and sewer, and zoning codes; (2) identifying impediments to incorporation of green technologies, (3) identifying opportunities to promote energy efficiency and other sustainable practices, and (4) recommending ways to incorporate climate adaptation measures into the codes.[49]

The Task Force responded with 111 proposed code additions or revisions.[50] The proposals primarily affect new buildings under construction and existing buildings that are being renovated; but, in some cases, the Task Force also proposed targeting upgrades to existing buildings to correct widespread problems.[51]

Currently, 48 of the 111 proposals have been enacted.[52] The enacted codes include new laws or amendments to existing law that: (1) add environmental protection as a fundamental principle of construction codes,[53] (2) streamline approvals for green technologies and projects,[54] (3) increase resiliency of buildings to natural disasters,[55] (4) increase energy efficiency[56] and decrease carbon emissions,[57] (5) remove impediments to alternative energy,[58] (6) increase indoor health and safety,[59] (7) increase resource conservation,[60] (8) manage stormwater more sustainably,[61] (9) promote sustainable urban ecological practices,[62] and (10) enhance water efficiency.[63] A list of enacted proposals, corresponding legal language, and detailed proposals is available at http://www.nyc.gov/html/gbee/html/codes/enacted.shtml.

Integrating Climate-Change Resiliency and Adaptation Priorities into Comprehensive Plans and Other Related Plans and Programs—Integration is a key challenge for local governments facing climate change risks. Because the impacts of climate change and the strategies to adapt to those impacts do not happen in isolation, municipalities must take care that a particular adaptation strategy, which may reduce vulnerability in one area, does not increase risk and vulnerability in another area. For example, as municipalities consider smart growth (efforts to create more compact communities in order to minimize carbon emissions from transportation), they must consider whether increased population densities increase vulnerability to disasters. Similarly, municipalities considering infill development (efforts to channel growth into existing cities), must consider the potential for increased disaster risks, given the locations of some cities and the tendency for redevelopment to favor waterfront locations.[64]

One way to facilitate integration is to address climate change resiliency and adaptation in local comprehensive plans and other overarching plans and programs. The American Planning Association's (APA's) 2002 Growing Smart Legislative Guidebook provides a list of recommended, required, and optional elements of a local comprehensive plan, including a natural hazards element, explaining:

> States and communities across the country are slowly, but increasingly, realizing that simply responding to natural disasters, without addressing ways to minimize their potential effect, is no longer an adequate role for government. Striving to prevent unnecessary damage from natural disasters through proactive planning that characterizes the hazard, assesses the community's vulnerability, and designs appropriate land use policies and building code requirements is a more effective and fiscally sound approach to achieving public safety goals related to natural hazards.[65]

In June 2013, New York City published its most recent comprehensive coastal protection plan—incorporating into the new plan climate change mitigation and adaptation as a primary focus.[66] The plan proposes a broad, diverse range of discrete coastal protection measures.[67]

> Some of the proposed measures mimic existing coastal features that performed well during Sandy. Others have been proven to be successful elsewhere. Where possible, the City has derived inspiration from the historic natural features that once protected the coastline throughout the city. Elsewhere, both traditional and newly developed technologies have been considered.[68]

For example, the plan proposes the use of augmented wetlands, reefs and living shorelines in some areas,[69] and the use of protective infrastructures, including local storm surge barriers, in other areas.[70] The array of proposed coastal measures are intended to be both complementary and capable of independent implementation over time.[71] Although the report notes that "ultimately the City will be best served by implementing the entire suite of options," the report claims that implementation of the 37 "Phase I" measures could reduce expected losses in a Sandy-like storm in the 2050s by up to 25 percent, or more than $22 billion.[72]

New York City is also in the process of updating its Waterfront Revitalization Program (WRP) to include climate change resiliency and adaptation as primary objectives.[73] The WRP is the city's "principal coastal zone management tool"; it "establishes the city's policies for development and use of the waterfront."[74] Despite this, nowhere in the current 46-page program was climate change or sea-level rise even mentioned. Addressing this deficiency, on October 30, 2013, the city approved a series of revisions to the WRP in order to advance the long-term goals laid out in *Vision 2020: the New York City Comprehensive Waterfront Plan*.[75] *Vision 2020* is organized around eight goals, one of which is climate resilience.[76] Specifically, *Vision 2020* proposes to use stormwater management and protection and restoration of wetlands, beaches, and natural shorelines to improve the ecological health of the city's water bodies. The plan recognizes the connection between these measures and protection of coastal neighborhoods from flooding and storm surges.[77] The revised WRP is now pending state and federal approval.[78]

Keeping Abreast of Current Scientific Analyses and Projections—Simply reviewing the vast quantity of data and analyses currently available can be a formidable task unto itself. However, municipalities cannot mitigate and adapt to risks if they do not understand the risks. Thus, municipalities must have a plan for continuing to evaluate and understand the available current scientific information on climate change.

To facilitate this, New York City convened the New York City Panel on Climate Change (NPCC) in 2008 and, in 2012, passed Local Law 42, which established the NPCC as an ongoing body.[79] In doing this, New York City became the first city to scale down the United Nation's IPCC global climate models to develop climate-related projections specific to a municipality.[80] Local Law 42 requires the NPCC to meet at least twice a year to review scientific data on climate change; recommend projections for the 2020s, 2050s, and 2080s within one year of the publication of the IPCC Assessment Reports, or, at a minimum once every three years; recommend a framework for stakeholders to incorporate climate change projections into their planning processes; and, advise the City's Office of Long-Term Planning and Sustainability on a communications strategy related to climate science.[81]

Local Law 42 also established a New York City climate change adaptation task force "consisting of city, state and federal agencies and private organizations and entities responsible for developing, maintaining, operating or overseeing the city's public health, natural systems, critical infrastructure, buildings and economy."[82] Local Law 42 requires the task force to create an inventory of potential climate-change-related risks to the city's communities, vulnerable populations, public health, natural systems, critical infrastructure, buildings and economy; develop adaptation strategies to address the risks; and, identify issues for further study.[83]

Conclusion

Notwithstanding municipalities' many impressive efforts, only a handful of which are discussed above, local land use laws are not yet being utilized sufficiently to create disaster-resilient or disaster-adaptive communities.[84] New York City has done substantially more than many other cities, including, critically, setting specific CO_2 emissions reduction targets and amending zoning and building codes. But, in light of the evidence of climate change and its impacts, local decision makers, resource managers, and planners throughout the state must ask whether we are doing enough. Failure to do so will continue to be costly in terms of property and public health, including lives.

Endnotes

1. Alejandro E. Camacho, *A Learning Collaboratory: Improving Federal Climate Change Adaptation Planning*, 2011 B.Y.U. L. Rev. 1821, 1821 (2011) (quoting Herbert George Wells, Mind at the End of Its Tether 19 (1945)).
2. Daniel Farber, *Symposium Introduction: Navigating the Intersection of Environmental Law and Disaster Law*, 2011 B.Y.U. L. Rev. 1783, 1786 (2011). Professor Farber is Co-Director of Berkeley Law's Center for Law, Energy & the Environment. *See* Daniel A. Farber, Faculty Profile, http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=1141 (last visited Feb. 3, 2014).
3. "Resilience" refers to "[t]he capacity of a system, community or society potentially exposed to hazards to adapt, by resisting or changing in order to reach and maintain an acceptable level of functioning and structure. This is determined by the degree to which the social system is capable of organizing itself to increase its capacity for learning from past disasters for better future protection and to improve risk reduction measures." United Nations International Strategy for Disaster Reduction, Terminology: Basic Terms of Disaster Risk Reduction, http://www.unisdr.org/eng/library/lib-terminology-eng%20home.htm (last visited Feb. 3, 2014).
4. Some definitions of "climate change" focus on changes in climate caused by human activities only, while others include all changes in climate, whether caused by human activity or natural variability in climate. *See, e.g.*, Intergovernmental Panel on Climate Change (IPCC), Climate Change 2007

Impacts, Adaptation And Vulnerability: Contribution Of Working Group II To The Fourth Assessment Report Of The Intergovernmental Panel On Climate Change 6 (Martin Parry et al. eds., 2007) ("IPCC usage refers to any change in climate over time, whether due to natural variability or as a result of human activity. This usage differs from that in the Framework Convention on Climate Change, where climate change refers to a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods." (emphasis omitted)), *available at* https://www.ipcc.ch/publications_and_data/ar4/wg2/en/contents.html.

5. The IPCC defines "mitigation" as "[a]n anthropogenic intervention to reduce the sources or enhance the sinks of greenhouse gases." *Id.* at ch. 18.1.2.

6. The IPCC defines "adaptation" as "the adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities." *Id.* at 6.

7. Insurance Coverage for Natural and Man-Made Disasters § 13:5 (WL Cat Claims database).

8. To help respond to climate change in New York City, the Mayor's Office convened the First New York City Panel on Climate Change in 2008. In January 2013, the Mayor's Office convened the Second New York City Panel on Climate Change (NPCC2). NPCC2 published a report in June 2013, which provided new climate change projections and future coastal flood risk maps for New York City. New York City Panel on Climate Change, Climate Risk Information 2013: Observations, Climate Change Projections, and Maps (C. Rosenzweig and W. Solecki eds., June 2013) (hereinafter "NPCC2"), *available at* http://www.nyc.gov/html/planyc2030/downloads/pdf/npcc_climate_risk_information_2013_report.pdf.

9. *Id.* at 7 ("While it is not possible to attribute any single extreme event such as Hurricane Sandy to climate change, sea level rise already occurring in the New York City area, in part related to climate change, increased the extent, and magnitude of coastal flooding during the storm.").

10. IPCC is the international advisory body on climate change, which was formed in 1988 by the World Meteorological Organization and the United Nations Environment Programme.

11. IPCC, Climate Change 2007: The Physical Science Basis: Contribution of Working Group I to the Fourth Assessment Report of the IPCC 15 (Susan D. Solomon et al. eds., 2007), *available at* https://www.ipcc.ch/publications_and_data/ar4/wg1/en/contents.html.

12. Monte Morin, *Some Climate Scientists, in a Shift, Link Weather to Global Warming*, L.A. Times, Oct. 12, 2012, http://articles.latimes.com/2012/oct/12/science/la-sci-weather-climate-change-20121013.

13. Mayor's Office of Long-Term Planning and Sustainability, City Hall, City of New York, PlaNYC Progress Report 2013: A Greener, Greater New York (June 2013) (hereinafter "Greener, Greater 2013 Progress Report"), *available at* http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc_progress_report_2013.pdf.

14. Union of Concerned Scientists: Citizens and Scientists for Environmental Solutions, "Findings of the IPCC Fourth Assessment Report: Climate change Mitigation" (2007).

15. IPCC, Climate Change 2013: The Physical Science Basis: Working Group I Contribution to the Fifth Assessment Report of the IPCC 2 (T.F. Stocker et al. eds. 2013), *available at* http://www.climatechange2013.org/images/report/WG1AR5_ALL_FINAL.pdf.

16. *Id.* at 121.

17. *Id.* at 37 ("Each of the past three decades has been successively warmer at the Earth's surface than any the previous decades in the instrumental record, and the decade of the 2000's has been the warmest.").

18. *Id.* at 40-41.

19. NPCC2, *supra* n. 8, at 4.

20. *Id.* at 4.

21. *See* Farber, *supra* n. 2, at 1801 & nn.86-90; Cat Lazaroff, *Climate Change Could Devastate U.S. Wetlands*, Env't News Serv., Jan. 29, 2002, http://www.ens-newswire.com/ens/jan2002/2002-01-29-06.asp.

22. Farber, *supra* n. 2, at 1803. Hurricane Katrina, for example, resulted in the loss of over two hundred square miles of wetlands. *Id.*

23. NPCC2, *supra* n. 8, at 20.

24. With only a 1.5 feet sea level rise, another storm like Sandy could require New York City to evacuate as many as 3 million people. With a 3-foot rise in sea level, major storms would inundate low-lying shore communities in Brooklyn, Queens, Staten Island, and Long Island, shut down the City's transportation system, flood the highways, and render the tunnels into the City impassable. An even greater sea-level rise, which appears possible by mid- to late-century given the continued pace of greenhouse gas emissions, "would place much of the city underwater—and beyond the reach of any protective measures." Bruce Stutz, *New York City Girds Itself for Heat and Rising Seas*, Yale Environment 360, Sept. 10, 2009, http://e360.yale.edu/content/feature.msp?id=2187 (discussing the results of the first NPCC report). The NPCC2 future flood maps illustrate how projected sea-level rises will expose additional areas of New York City to flooding during extreme storm events. *See* NPCC2, *supra* n. 8, at 27.

25. Greener, Greater 2013 Progress Report, *supra* n. 13.

26. The $90 billion estimate does not account for any damage to new construction because it assumes no further development in flood-prone areas. Mayor's Office of Long-Term Planning and Sustainability, City Hall, City of New York, PlaNYC: A Stronger, More Resilient New York 34 (June 2013) (hereinafter "Stronger, More Resilient 2013"), *available at* http://www.nyc.gov/html/sirr/html/report/report.shtml.

27. NPCC2, *supra* n. 8, at 4-5 & 18-21.

28. *Id.* at 22.

29. *See* Stronger, More Resilient 2013, *supra* n. 26, at 26 (reporting that a 2006 heat wave caused 140 deaths in New York).

30. *See, e.g.*, Maxine Burkett, *Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change*, 20 Geo. Mason L. Rev. 775, 780-81 (2013).

31. A national survey of public and private emergency managers, code specialists, and engineers found that building codes and land use planning ranked as the *most effective tool* to achieve hazards vulnerability reduction. Patricia Salkin, *Sustainability at the Edge: The Opportunity and Responsibility of Local Governments to Most Effectively Plan for Natural Disaster Mitigation*, 38 Envt'l L.R. 10158, 10158 & n.3 (July 8, 2008), *available at* SSRN: http://ssrn.com/abstract=1157153.

32. *Id.* at 10159.

33. John R. Nolon, *Disaster Mitigation Through Land Use Strategies*, 23 Pace Envtl. L. Rev. 959, 976-77 (2006).

34. *See* Salkin, *supra* n. 31, at 10162-69 (discussing sustainability tools in local government toolbox).

35. 44 C.F.R. § 201.6.

36. Disaster Mitigation Act of 2000, P.L. 106-390 (Oct. 30, 2000), *codified at* 42 U.S.C. § 5165(a).

37. 44 C.F.R. § 201.6(c). The rules provide an exception for some small, impoverished communities, *id.* § 201.6(a)(3), and also allows for the use of multi-jurisdictional plans (for example, watershed plans) "as long as each jurisdiction has participated in the process and has officially adopted the plan," *id.* § 201.6(a)(4).

38. New York City Office of Emergency Management, Emergency Planning: Hazard Mititgation Plan, http://www.nyc.gov/html/oem/html/planning_response/planning_hazard_mitigation_2014.shtml (last visited Feb. 7, 2014).

39. *See* City of New Rochelle Multi-Hazard Mitigation Plan (Sept. 2010), http://www.newrochelleny.com/DocumentCenter/Home/View/707; Village of Larchmont Hazard Mitigation Plan (Sept. 2013) (revised), http://villageoflarchmont.org/wp-content/uploads/2013/09/Hazard-Mitigation-Plan-0913-pdf.pdf.

40. Nassau Hazard Mitigation Plan (2007), http://www.nassaucountyny.gov/agencies/oem/hazmit/hazmitNHMP.html.

41. *See* Michael Burger et al., *Rethinking Sustainability to Meet the Climate Change Challenge*, 43 Envtl. L. Rep. News & Analysis 10342, 10346 (2013).

42. The New York State Department of Environmental Conservation (DEC) provides resources for local communities to decrease greenhouse gas emissions. *See* Climate Smart Communities Summary for Local Officials, *available at* http://www.dec.ny.gov/energy/50851.html (last visited Feb. 10, 2014).

43. Numerous related New York City publications, including the 2007 and 2011 *Greener, Greater New York* reports and annual progress reports, are available at http://www.nyc.gov/html/planyc2030/html/publications/publications.shtml.

44. Greener, Greater 2013 Progress Report, *supra* n. 13, at 6.

45. *Id.*

46. *See* Salkin, *supra* n. 31, at 10162 nn.58-60 (citing cases).

47. *See* Salkin, *supra* n. 31, at 10162-69 (discussing sustainability tools in local government toolbox).

48. City Of New York, Planyc: New York City Local Law 84 Benchmarking Report 5 (Sept. 2013), http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/ll84_year_two_report.pdf.

49. Letter from Michael Bloomberg, Mayor, and Christine Quinn, Speaker of the Council of the City of New York, to Russell Unger, USGBC New York, July 8, 2008, in Executive Summary, NYC Green Codes Task Force: A Report to Mayor Michael R. Bloomberg & Speaker Christine C. Quinn (Feb. 2010), *available at* http://www.nyc.gov/html/gbee/downloads/pdf/gctf_executive_summary.pdf.

50. Each proposal includes statutory language, a detailed explanation of the issues, an analysis of costs and savings, precedents from other jurisdictions, a comparison of the proposal to any related LEED credits, and information on implementation.

51. *See* NYC Local Law 85 of 2009.

52. PlaNYC, Green Buildings & Energy Efficiency, GCTF Enacted Proposals website, http://www.nyc.gov/html/gbee/html/codes/enacted.shtml (last visited Mar. 14, 2014); *see also* Sarah Adams-Schoen, *On the Waterfront: New York City's Climate Change Adaptation and Mitigation Challenge, Part 1*, 25 Envtl. L. in N.Y. 81, 87–89 (Apr. 2014).

53. NYC Local Law 49 (2010).

54. NYC Local Law 5 (2010).

55. *See, e.g.*, NYC Building Code Appendix G and NYC Local Law 143 (safeguard toxic materials stored in flood zones); NYC Local Law 81 (2013) (forecast non-flood climatic hazards to 2080); NYC Local Law 79 (2013) (ensure toilets and sinks can operate during blackouts).

56. *See, e.g.*, NYC Local Law 52 of 2010 (lighting efficiency in apartment buildings); NYC Local Law 48 of 2010 (manual on-automatic off lighting); NYC Local Law 47 of 2010 (reduction of artificial lighting in sunlit lobbies and hallways).

57. *See, e.g.*, NYC Local Law 21 of 2011 (reduce summer heat with cool roofs); NYC Local Law 141 of 2013 (reduce CO2 emissions from specialized concrete); 2010 ECCCNYS, Ch. 5 and ASHRAE 90.1 2010 Ch. 5 (minimize air leakage building exteriors); NYC Rules, Title 1, Ch. 5000 (ensure lighting systems function properly).

58. *See, e.g.*, NYC Rules, Title 63, Ch. 1 (LPC) (remove landmarks impediments to alternative energy); NYC Local Law 20 of 2011 (allow large solar rooftop installations); NYC Local Law 28 of 2012 (increase allowable size of solar shades); NYC Local Law 43 of 2010 (allow use of biofuels).

59. *See, e.g.*, NYC Local Law 2 of 2012 (limit harmful emissions from carpets); Federal Formaldehyde Standards for Composite Wood Products Act (restrict cancer-causing formaldehyde in building materials); NYC Local Law 72 of 2011 (filter soot from incoming air); NYC Rules, Title 15, Ch.2 (phase out dirty boiler fuels); NYC LL 43 of 2010 (DEP) (phase out dirty boiler fuels); NYC Local Law 70 of 2011 (treat corrosive concrete wastewater); NYC Rules, Title 15, Chapter 1 (DEP) (reduce "red tape" for asbestos removal); NYC Local Law 55 of 2010 (increase availability of drinking fountains).

60. *See, e.g.*, NYC Local Law 60 of 2012 (provide recycling areas in apartment buildings); NYC Local Law 71 of 2011 (use recycled asphalt).

61. *See, e.g.*, NYC Rules, Title 15, Chapter 31 (DEP) (reduce stormwater runoff from new developments); NYC Rules, Title 15, Chapter 31 (DEP) (send rainwater to waterways); NYC Rules, Title 15, Chapter 31 (DEP) (encourage innovative stormwater practices); NYC Rules, Title 15, Chapter 31 (DEP) (maintain site-based stormwater detention systems).

62. *See, e.g.*, NYC Local Law 80 of 2013 (construct sustainable sidewalks).

63. *See, e.g.*, NYC Local Law 57 of 2010 (enhance water efficiency standards); NYC Local Law 56 of 2010 (catch leaks by measuring water use); NYC Local Law 54 of 2010 (stop wasting drinking water for cooling).

64. Lisa Grow Sun, *Smart Growth in Dumb Places: Sustainability, Disaster, and the Future of the American City*, 2011 B.Y.U. L. Rev. 2157 (2011); *see also* Farber, *supra* n. 2, at 1803.

65. Salkin, *supra* n. 31, at 10163 & n.70 (citing and quoting Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change chs. 7-142 & 7-143 (Stuart Meck ed., 2002)).

66. Stronger, More Resilient 2013, *supra* n. 26, at 50-65.

67. *Id.* at 50-65.

68. *Id.* at 50.

69. *Id.* at 53.

70. *Id.* at 56.

71. *Id.* at 40.

72. *Id.*

73. New York City's local WRP is authorized by New York State's Waterfront Revitalization of Coastal Areas and Inland Waterway Act, McKinney's Exec. Law Ch. 18, Art. 42, which stems from the Federal Coastal Zone Management Act, 16 U.S.C. § 1452. The implementing regulations of the New York Act and coastal area policies can be found in the Department of State regulations, 19 N.Y.C.R.R. Part 600.

74. New York City Department of City Planning, NEW WATERFRONT REVITALIZATION PROGRAM 3 (Sept. 2002) (hereinafter "2002 WRP"), *available at* http://www.nyc.gov/html/dcp/pdf/wrp/wrp_full.pdf; *see also* New York City Department of City Planning, The Waterfront Revitalization Program, http://www.nyc.gov/html/dcp/html/wrp/index.shtml (last visited Feb. 3, 2014).

75. New York City Department of City Planning, THE NEW YORK CITY WATERFRONT REVITALIZATION PROGRAM: NEW YORK CITY APPROVED REVISIONS PURSUANT TO SECTION 197-A OF THE CITY CHARTER 5 (Oct. 30, 2013) (hereinafter "2013 WRP") (discussing history of New York City's WRP and New WRP).

76. The eight goals are: expand public access, enliven the waterfront, support the working waterfront, improve water quality, restore the natural waterfront, enhance the Blue Network (the waterways themselves), improve governmental oversight, and increase climate resilience. *Id.*

77. *Id.* at 6.

78. The City Council approved the revisions to the WRP on October 30, 2013. The revised WRP will go into effect upon approval by the New York State Department of State and the U.S. Department of Commerce.

79. NYC Local Law 42 of 2012.

80. IPCC, the international advisory body on climate change, was formed in 1988 by the World Meteorological Organization and the United Nations Environment Programme. *See* NPCC2, *supra* n. 8, at 34 (glossary of terms).

81. *Id.*

82. *Id.*

83. *Id.* The task force is also responsible for reviewing the NPCC's climate change projections, evaluating potential impacts of climate change on public health, including delivery of public health services to the city's vulnerable populations; evaluating the potential impacts of climate change on the city's natural systems, critical infrastructure and buildings; identifying rules, policies and regulations governing public health, natural systems, critical infrastructure, buildings and economy that may be affected by climate change; and, formulating and updating coordinated strategies to address the potential impact of climate change on the city's communities, vulnerable populations, public health, natural systems, critical infrastructure, buildings and economy. *Id.*

84. "According to anecdotal information from those who prepared the first round of state and local disaster mitigation plans submitted to FEMA,…there is little emphasis in them on the use of effective local land use strategies to create disaster resilient, or adaptive, communities." Nolon, *supra* n. 33, at 967.

Sarah Adams-Schoen is a Professor at Touro Law Center and Director of Touro Law's Land Use & Sustainable Development Law Institute. She is the author of the blog Touro Law Land Use (http://tourolawlanduse.wordpress.com), which is designed to foster greater understanding of local land use law, environmental law, and public policy. Adams-Schoen teaches, among other things, Environmental Criminal Law at Touro Law Center. Prior to joining the Touro Law Center faculty, Adams-Schoen taught as a visiting and adjunct professor at Lewis & Clark Law School and practiced law in Portland, Oregon. **Adams-Schoen thanks Land Use & Sustainable Development Law Institute Research Fellow Alyse Delle Fave (Touro Law Center 2015) for her assistance on the research for this article.**

SEQRA Update: Revised Long and Short Environmental Assessment Forms

By Keith P. Brown and John Anzalone

Keith Brown

As defined in the State Environmental Quality Review Act ("SEQRA"), the Environmental Assessment Form ("EAF") is a form used by an agency to assist it in determining the environmental significance or nonsignificance of actions.[1] A properly completed EAF must contain enough information to describe the proposed action, its location, its purpose and its potential impacts on the environment.[2]

Recently, the New York State ("NYS") Department of Environmental Conservation ("DEC") adopted substantially revised Long Environmental Assessment Forms ("LEAF") and Short Environment Assessment Forms ("SEAF"). According to the NYS DEC, these are the first significant changes to the LEAF since 1978 and to the SEAF since its last revision in 1987.[3]

The NYS DEC has amended the documents as part of its efforts to "streamline" the SEQRA process. In furtherance of this goal, the NYS DEC required, as of October 7, 2013, that substantially more comprehensive information be included on both the LEAF and SEAF.[4] Since then, all Towns and Villages are prohibited from using the prior forms for new applications. Pending applications may continue to use the prior forms if the applications were submitted to the municipality before October 7, 2013.[5]

In order to assist with the completion of the SEAF and LEAF, the NYS DEC has developed an "EAF Mapper" to automatically complete some portions of the SEAF and LEAF upon entering the subject property's location. Although the mapper was not available when the new SEAF and LEAF came into effect on October 7, 2013, the mapper was made available as of October 30, 2013 at http://www.dec.ny.gov/eafmapper/.

Modifications to the Short Environmental Assessment Form

As a result of the modifications, the SEAF has doubled in size from two pages to four pages in length. The portion of the SEAF to be completed by sponsors/applicants has increased from one page to over two pages to accommodate additional questions from the NYS DEC. The new questions that sponsors/applicants must answer include, among others, the following:

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1. Is the proposed action consistent with the predominate character of the existing built or natural landscape?
2. Is the site located in, or does it adjoin, a state-listed Critical Environmental Area?
3. Will the proposed action result in a substantial increase in traffic above present levels?
4. Is the proposed action in an archeological sensitive area?
5. Does any portion of the site of the proposed action, or lands adjoining the proposed action, contain wetlands or other water bodies regulated by a federal, state or local agency?
6. Does the site of the proposed action contain any species or animal, or associated habitats, listed by the State or Federal Government as threatened or endangered?

Accordingly, it appears that the completion of the new SEAF will now require greater knowledge of state and federal regulations affecting both the subject property and any adjoining properties. This may make the completion of the SEAF difficult for lay persons unfamiliar with the state and federal regulations and the judgments required to answer the more subjective questions. The questions above, and others referencing various state and federal statutes, do not provide any sort of citation or indication to guide the applicant toward the relevant statute in order to properly answer the question. Instead, the applicant must know enough to realize the questions implicitly reference state and federal statutory schemes and then extensively research the referenced statute(s) to determine whether the question applies to the proposed development and appropriately respond. Without extensive research of the relevant state and federal statutes, a sponsor/applicant that does not understand the relevant statutory schemes risks providing inappropriate responses that

could significantly delay development and increase project costs.

Modifications to the Long Environmental Assessment Form

Similar to the SEAF, the applicant's portion of the LEAF was increased in size from 10 pages to 13. The information included on the LEAF appears to have been reordered with the Governmental Approval and Zoning sections moved up to pages 2 and 3. It also appears that the State is now requiring more detailed responses to questions contained in the LEAF. To assist with the completion of the LEAF, the NYS DEC has indicated that up to 20 questions on the LEAF will be completed with the "EAF Mapper." Nevertheless, many questions, and their corresponding sub-parts, will still require consultation with experts, including engineers, architects and attorneys, due to the technical nature of the questions.

Conclusion

The revisions to the LEAF and SEAF represent a substantial modification to the forms that applicants, municipalities, engineers, architects and other design professionals have been accustomed to using in New York State. While the stated reason for requiring the additional information is to "streamline" the State's SEQRA review, it remains to be seen if the revised forms will further this goal or will serve as a hindrance to development in the State.

Endnotes

1. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.2(m).
2. *Id.*
3. N.Y. Dept. of Environment Conservation, http://www.dec.ny.gov/permits/93240.html (Feb. 8, 2014).
4. *Id.*
5. *Id.*

Keith P. Brown is a partner at Brown & Altman, LLP, a Melville, Long Island firm that offers a range of legal services to the real estate development industry. The firm concentrates on commercial real estate law, including real estate transactions, leasing, financing, title, environmental, zoning, permitting and litigation. Mr. Brown can be reached by telephone at (516) 222-0222 and email at kbda@brownaltman.com.

John Anzalone is an associate at Brown & Altman, LLP, having joined the firm in March, 2011. John can be reached by telephone at (516) 222-0222 and email at janzalone@brownaltman.com.

An Assessment of Mayor Bloomberg's Public Health Legacy

Lawrence O. Gostin is the Linda D. and Timothy J. O'Neill Professor of Global Health Law at Georgetown University Law Center. He also is, among other things, the Director of the World Health Organization Collaborating Center on Public Health Law and Human Rights. Professor Gostin is the author of a number of books and scholarly articles. As New York City Mayor Michael Bloomberg's last term was coming to an end, Professor Gostin wrote an article for the Hasting Center Report *addressing Bloomberg's public health legacy.*[1] *Rodger Citron ("Q" in the exchange below) has edited that article into a question and answer format and also asked Professor Gostin ("LG") to elaborate on a number of points made in that article.*[2]

Lawrence O. Gostin

Q You begin by noting that Mayor Bloomberg's public health policies have been controversial and that "his health legacy is bitterly contested."

LG Yes. "The public health community views him as an urban innovator—a rare political and business leader willing to fight for a built environment conducive to healthier, safer lifestyles. To his detractors, however, Bloomberg epitomizes a meddling nanny—an elitist dictating to largely poor and working class people about how they ought to lead their lives."

Q And just so we know your views from the start, are you generally supportive of Mayor Bloomberg's efforts with respect to public health law?

LG Yes. I believe that "[g]overnments should be held accountable for the health of their inhabitants." I also believe that "[t]hose who disrupt the status quo," such as Mayor Bloomberg, "are not the only ones who must shoulder the burden of accountability. Public officials have largely stood by as obesity rates have skyrocketed. While the Mayor has drawn fierce criticism and legal challenges, there has been scant accountability for government inaction.

"Progress will be piecemeal through experiments and incremental steps, which are gradually embraced as the norm. This can be uninviting work for politicians, who fixate on the next election cycle. The public health community should take time to recognize and defend its champions—and Mayor Bloomberg undoubtedly is among our most courageous and creative advocates for a healthier and safer population."

Q Do you have any thoughts on how Mr. Bloomberg could continue to promote public health now that he no longer is Mayor? Will it simply be a matter of supporting programs through his foundations?

LG Mr. Bloomberg has announced a new nonprofit consulting group that will troubleshoot for big cities, advising them about how to address the critical problems of urbanization and health, such as smoking, diet, and physical activity. He plans to help design cities to make health the easier choice. He will also continue his work on diet and tobacco through Bloomberg philanthropies, as well as engage in issue-oriented political advertising such as on firearm control. All of this is positive from a public health perspective.

Anti-Obesity Measures

Q Before we discuss the various measures taken during the Bloomberg administration to combat obesity, can you describe the nature and extent of obesity in New York City?

LG "Mirroring national trends, being overweight or obese is now the norm in New York City (58 percent of adults), with black, Latino, and low-income communities hardest hit—reaching 70 percent in the poorest neighborhoods.[3] Perhaps more disturbing: 40 percent of the city's youth are overweight or obese, compared to 33.2 percent nationally.[4] If not reversed, today's generation could live shorter lives than their parents."

Q You note that Mayor Bloomberg banned trans fats, required menu labeling, launched a salt reduction initiative, and has attempted—so far unsuccessfully—to regulate the container size of sugary drinks. Can you describe each measure? And can you also explain what has been controversial about each measure? Let's start with the trans fats ban.

LG Trans fat is made through the process of hydrogenation of oils. Essentially, hydrogenation solidifies liquid oils; this increases the shelf life and flavor stability of oils and foods that contain them. "Artificial trans fatty acids provide no health benefit and are unsafe at any consumption level.[5] In 2006, the City required that any food served to customers (unless in a sealed package) contain less than 0.5 grams of trans fat per serving, and many cities have followed suit.… Although the trans fat limit received a warmer public response than other diet-related policies, it still met opposition from restaurants and civil libertarians. Economic interests drove much of the debate, with claims

that it would raise food prices, affecting employment and consumers. Consumers feared the ban would affect the taste of baked goods, arguing that the state should not dictate what people eat. But after a half-decade of experience, the fears proved unfounded, with no attributable rise in food prices or noticeable difference in taste."

Q With menu labeling, there was litigation challenging the measure.

LG Yes. "The Board of Health in 2006 required restaurants that voluntarily disclosed calorie information to post calories in standard form. The New York State Restaurant Association (NYSRA) challenged the regulation, alleging that federal law preempted the Board's action. The court agreed, but only because the statute did not apply uniformly to all chain restaurants.[6] A revised regulation, enacted in 2008, addressed the court's concerns by requiring all chain restaurants to disclose calories on menus and menu boards. The NYSRA then challenged the amended regulation under the First Amendment, but the Second Circuit found that compelled disclosure of truthful, objective information did not violate the commercial speech doctrine.[7]"

Q What is the purpose of menu labeling? And is it effective?

LG "Menu labeling facilitates informed decision-making. Individuals underestimate the caloric content of food, and, on average, consume more than one-third of their calories away from home.[8] Most studies, however, show that posting calories has little effect on aggregate purchasing decisions.[9] This may be attributable, in part, to the failure to provide context. Researchers suggest that providing a physical activity equivalent (e.g., 450 calories equals 80 minutes of running) would be effective.[10]"

Q What was the National Salt Reduction Initiative ("NSRI")? And why was it adopted?

LG "The City launched the NSRI in 2009—a public-private partnership of more than 90 health agencies and associations. Companies voluntarily pledged to reduce sodium by 20 percent in overall sales within a given food category (e.g., canned soup) by 2014. This still left ample room for high sodium foods provided the producer offset these with low sodium alternatives within the category. Many companies have joined NSRI, with 21 meeting sodium checkpoints in 2012.[11]

"Americans consume over twice the daily recommended 1,500 mg of sodium, increasing blood pressure. Excess salt intake is associated with 136,000 deaths per year, and a small reduction could prevent many of these deaths, saving $10-24 billion annually in medical costs.[12] Little of the sodium excess comes from the shaker—80 percent is added to prepared or packaged foods. The problem, then, is not primarily behavioral but rather lies in food manufacturing and marketing."

Q Last, but certainly not least, we come to the regulation of the size of containers for sugary drinks.[13] You note that, over time, "[s]oft drink portion sizes have grown dramatically, along with Americans' waistlines." This measure regulates only the serving size for certain sugary drinks[14]—yet it has been enormously controversial. Why is that?

LG "While a 12-ounce soda was 'king-size' in 1950, it is now marketed as a child portion… Sugar-sweetened drinks account for a substantial portion of increased caloric intake.[15] The beverage size limit has come to exemplify Bloomberg's Nanny State. Amid intense publicity, polls registered disapproval among city residents and nationally."

Q Do you have any thoughts on how Mayor Bloomberg attempted to promote the measure? As a political matter, should he have done anything differently?

LG He decided to act in this area because research demonstrates a significant correlation between portion sizes and weight gain, as well as between sugary drink consumption and weight gain. It makes sense to gently guide consumers to drink small portions of sugary drinks. The best way to enact such a measure would have been through the elected city council. However, he may have been concerned that politically it would not pass the city council. Consequently, he sought to effectuate the change through the New York City Board of Health.

Q Do you have a prediction as to how the New York Court of Appeals will rule on the validity of the soda container regulation? As you note, both the New York Supreme Court and Appellate Division held that the measures violated the doctrine of separation of powers.

LG I am not confident the measure will be upheld by New York's highest court, although I think it should be. The major sticking point will be that the mayor circumvented the elected city council, and thus violated the principle of separation of powers. This is essentially an administrative law, rather than a public health, question.

Efforts to Regulate Tobacco

Q Mayor Bloomberg seems to be just as famous for his anti-smoking measures as he is for his campaign against super-size sodas. Can you describe the extent to which smoking presents a public health problem?

LG "At the turn of the millennium, smoking took nearly 9,000 lives annually in New York City—and it remains the leading cause of preventable death. Half of the city's 1.3 million smokers were expected to die prematurely from tobacco-related diseases. A disproportionate toll of suffering and early death fell on minorities and the poor. These grim facts motivated the Mayor's office to develop a suite of tobacco control policies. The results have been remarkable, with the rate of smoking falling from 21.5 percent to 14.8 percent between 2002 and 2011 among adults, and from 17.5 percent to 8.5 percent among youth."[16]

Q His initial efforts involved enacting smoke-free laws and raising cigarette taxes. Let's start with the former. What effect have measures like the Smoke-Free Act had on the population?

LG "In 2002, 57 percent of city food workers spent most of their waking hours inhaling second-hand smoke, increasing their cancer risk by 50 percent. That year, New York City banned smoking in all restaurants and bars. The environmental effects were powerful: just one year later, cotinine concentrations—a biomarker to detect nicotine exposure—decreased by 83 percent and tobacco-related symptoms decreased from 88 percent to 38 percent.[17] The vociferous protests by businesses that this would drive customers away proved unfounded, with patrons welcoming the change. The City's Smoke-Free Act changed norms nationwide. At the time, only California and a few cities had smoke-free laws, but now more than 80 percent of Americans live smoke-free.

"The mayor went further in 2011 by extending the smoking ban to parks, beaches, and pedestrian plazas. Side-stream smoke poses a much lower risk in outdoor spaces." Banning cigarettes outdoors is highly paternalistic. But smoking has become culturally unacceptable, with the regulation receiving wide support (69 percent).[18] Even though the ban is not rigorously enforced, it reinforced the culture of a smoke-free environment.

Q Cigarette taxes discourage smoking, but also are criticized as regressive. Is that a correct statement and a fair criticism?

LG The first statement is correct, the second is not incorrect but it also is incomplete. "Raising cigarette prices reduces smoking, with youth particularly susceptible—for every 10 percent price rise, youth smoke 7 percent less.[19] In 2002, New York City increased the tax per pack from $0.08 to $1.50, precipitating a decline in smoking prevalence. Initially many smokers avoided the tax by buying in adjacent jurisdictions, but over time this avoidance behavior subsided. The tax is regressive, falling on smokers who are disproportionately poor and working class. Yet, the resulting benefits of reduced smoking are distributed progressively—a tradeoff between economic justice and health justice."

Q And, as with some of the efforts to combat obesity, one of the anti-smoking laws involving marketing restrictions resulted in litigation. Can you say more about the measure?

LG "In 2009, the City required retailers to display graphic warnings with images of cancerous lungs, decayed teeth, or stroke-damaged brains. The regulation, however, never went into effect" because "the Second Circuit ruled that federal law preempted the local regulation.[20] Fast-forward to 2013: the United States and other countries have proposed graphic labeling. These too are bitterly contested, with Big Tobacco claiming they violate commercial speech rights and take property without just compensation. Despite the setback, Bloomberg has sought other ways to discourage tobacco purchases at the point of sale." For example, in April 2013, "Bloomberg proposed an increase in the minimum age for buying tobacco from 18 to 21, giving New York City the strictest age limits in the nation." This proposal has now received the approval of the City Council, and has been enacted into law.

Critiques of Bloomberg's Policies

Q You note that "a familiar litany of critiques shadows any novel public health policy: the science is inconclusive; freedom of choice is constrained; the executive is exercising unilateral power; beware of slippery slopes; corporations have rights too; and justice demands protecting the vulnerable against state interference." The most significant seems to be the charge of paternalism.

LG "The societal discomfort with Bloomberg's agenda, at its core, is grounded in distrust of government telling autonomous adults how to conduct their lives. The City's health policies intrude on personal space—a sphere over which individuals supposedly exercise free will. Many believe that the State should not assume responsibility for these self-regarding decisions."

Q What is your view of the paternalism criticism?

LG "American antipathy toward paternalism drives policy makers to try to justify interventions under the harm principle—e.g., second-hand smoke, medical costs, and lost productivity. Third party harms are not imaginary, but the real policy intent is to ease the grave burdens of diabetes, heart disease, cancer, and emphysema. Health officials genuinely believe it is unwise for individuals to smoke, overeat, live sedentary lives, or do myriad other things that cause them suffering and early death. The public health approach rejects the idea of unfettered free will, recogniz-

ing instead that the built environment, social networks, marketing, and a range of situational cues drive complex behaviors. There are reasons, beyond personal responsibility, that health outcomes skew drastically by socioeconomic status. The job of public health is to make healthy living the easier choice.

"More importantly, Bloomberg's policies are not all that intrusive, and certainly not as burdensome as the underlying diseases. Nutrition, physical activity, and tobacco control policies are not morally equivalent to quarantines or forced treatment. Often, they represent nothing more than a return to the norms of the recent past—such as smaller food portions and more livable spaces. Other interventions actively create a 'new normal' such as reduced trans fat, sodium, and sugar, or limiting advertising to children. Once implemented, many interventions are embraced; few of us are nostalgic for the days of smoke-filled restaurants and workplaces. The real burden, moreover, is on industry, not consumers. One can see this vividly in New York City, where food makers funded public opposition to the soda portion ban."

Q In your view, it seems, the value of "unfettered free will" should be balanced against the burdens and costs of the underlying diseases that may follow from the exercise of free will. Is this view widely held by the public? If not, why not?

LG Although I believe this framing of the issue is correct ethically, it has been difficult to sustain in public and political discourse. I think that the value of unfettered autonomy in the United States has gotten way out of proportion. In the end, what matters is how much an invasion of individual interests the measure will entail, balanced against the public good. This kind of balancing of interests would give equal value to the common good and to individual autonomy.

Q I always find the intersection of law and science interesting. How has that intersection played out with respect to the criticism that because the scientific evidence is inconclusive, Bloomberg's measures should not have been adopted or have not been effective?

LG "Critics invariably challenge chronic disease policies as lacking sufficient evidence of effectiveness. At the most extreme, they demand conclusive proof, charging for example that the science behind the trans fat ban is 'not indubitable.'[21] Science, of course, seldom reaches consensus, least of all on the causation of complex multifactorial diseases. Rarely are policymakers expected to demonstrate a certainty, or even high probability, of 'success' in other domains. In most policy spheres, we understand that causal relationships are difficult to demonstrate in a world filled with complexity—but critics often demand it of public health.

"Yet, a reasonable level of logic and research guides all of Bloomberg's interventions. Even with the soda portion limit (perhaps the hardest case), the Mayor relied on science to support a creative, untested strategy: sugary drinks deliver empty calories, with a direct relationship to obesity, while portion sizes have grown exponentially. Society cannot know what works until common sense ideas are tested.

"Related to scientific uncertainty is the demand for consistency—illustrated by the criticism of the soda portion limit, which applies to McDonald's supersized drinks but not to 7-Eleven's Big Gulps. Few policies are perfectly consistent, but rather are crafted as political compromises.… A direct tax on sugary drinks would have been a more logical intervention than portion control, but New York State has been unwilling, despite Bloomberg's requests."

Q You discuss a number of criticisms in the article that, in my view, are self-explanatory. For example, the corporate rights critique involves corporations attempting to protect their economic interests by contending that public health measures are not in the public interest and violate consumer's rights; the unilateral executive power criticism asserts that the Mayor has exceeded his legal authority in violation of separation of powers principles; and the slippery slope argument is, as you note, that "if a particular policy is implemented, it will lead to ever-more invasive policies in the future."

The last critique I want you to address in this question concerns what you call "dueling conceptions of justice." What do you mean by that?

LG "Because obesity- and tobacco-related diseases fall primarily on African Americans, Latinos, and the working class, interventions necessarily apply disproportionately to those groups. This means, of course, that any intrusion on autonomy or privacy will fall primarily on the vulnerable.…Tobacco taxes are regressive, which liberals normally oppose. Industry and civil libertarians have joined together to decry the injustice of health measures that tread disproportionately on the liberty of the poor and minorities."

Q What is your view of this critique?

LG I think that "[t]his is a curious conception of justice because it focuses solely on the fair distribution of the downsides of obesity or tobacco policies—i.e., limits on liberty. The justice argument fails miserably in weighing the corresponding health benefits to the poor. Government's *failure* to act to reduce suffering and early death visited mostly in poor neighborhoods is the far greater injustice…If policies work, a negligible limit on unfettered choice seems a very small price to pay for ameliorating the devastation to the individual and her family from chronic diseases. The opportunity for a healthy life is the primary freedom, as it underwrites so many of life's options."

Endnotes

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14. See *supra* note 1, at 20. "To curb consumption, the Board of Health proscribed serving sizes greater than 16 ounces for sweetened beverages containing more than 25 calories per eight ounces. The rule, however, excluded beverages containing alcohol or more than 50 percent milk and did not cover state regulated businesses—including 7-Eleven." *Id*.
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Lawrence O. Gostin is the Linda D. and Timothy J. O'Neill Professor of Global Health Law at Georgetown University Law Center. Rodger D. Citron is a Professor of Law at Touro Law Center. His wife, Andrea Cohen, served as the Director of Health Services in the New York City Office of the Deputy Mayor for Health and Human Services in the Bloomberg administration.

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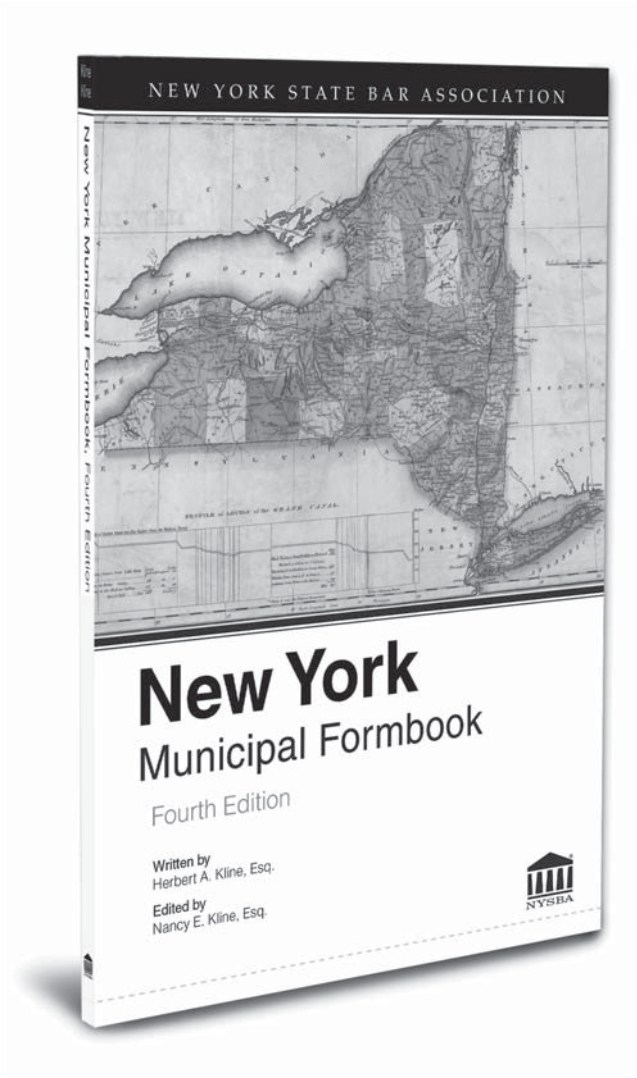

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Owen B. Walsh
Owen B. Walsh, Attorney at Law
34 Audrey Avenue
P.O. Box 102
Oyster Bay, NY 11771-0102
obwdvw@aol.com

Employment Relations
Sharon N. Berlin
Lamb & Barnosky LLP
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, NY 11747-9034
snb@lambbarnosky.com

Ethics and Professionalism
Steven G. Leventhal
Leventhal, Cursio, Mullaney & Sliney, LLP
15 Remsen Avenue
Roslyn, NY 11576-2102
sleventhal@lcmslaw.com

Mark Davies
New York City Conflicts of Interest Board
2 Lafayette Street, Suite 1010
New York, NY 10007
davies@coib.nyc.gov

Land Use, Green Development and Environmental
Daniel A. Spitzer
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202-4040
dspitzer@hodgsonruss.com

Legislation
A. Joseph Scott, III
Hodgson Russ LLP
677 Broadway, Suite 301
Albany, NY 12207-2986
ascott@hodgsonruss.com

Mandate Relief Task Force
Michael E. Kenneally Jr.
The Association of Towns
150 State Street
Albany, NY 12207
mkenneally@nytowns.org

Sharon N. Berlin
Lamb & Barnosky LLP
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, NY 11747-9034
snb@lambbarnosky.com

Membership and Diversity
A. Thomas Levin
Meyer, Suozzi, English & Klein P.C.
990 Stewart Avenue, Suite 300
P.O. Box 9194
Garden City, NY 11530-9194
atl@atlevin.com

Nichelle A. Johnson
50 Hillcrest Road
Mount Vernon, NY 10552-1509
njohnson@cmvny.com

Municipal Counsel
E. Thomas Jones
Town of Amherst
5583 Main Street
Williamsville, NY 14221
etjlaw@roadrunner.com

Carol L. Van Scoyoc
White Plains Corp. Counsel's Office
Municipal Office Building
255 Main Street
White Plains, NY 10601
cvan@whiteplainsny.gov

State and Federal Constitutional Law
Sharon N. Berlin
Lamb & Barnosky LLP
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, NY 11747-9034
snb@lambbarnosky.com

Adam L. Wekstein
Hocherman Tortorella & Wekstein, LLP
One North Broadway
White Plains, NY 10601
a.wekstein@htwlegal.com

Taxation, Finance and Economic Development
Kenneth W. Bond
Squire Sanders (US) LLP
30 Rockefeller Plaza, 30th Floor
New York, NY 10112
kenneth.bond@squiresanders.com

Michael E. Kenneally Jr.
The Association of Towns
150 State Street
Albany, NY 12207
mkenneally@nytowns.org

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